

**No. 11532**

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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**TRANSCRIPT OF RECORD**

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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FILED

JUL - 3 1947

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

JOSEPH J. CUMMINS

729 South Hope Street  
Los Angeles 14, Calif.

For Appellee:

JAMES M. CARTER

United States Attorney

ERNEST A. TOLIN

Assistant U. S. Attorney

NORMAN NEUKOM

Assistant U. S. Attorney

600 U. S. Post Office and Court House Building

Los Angeles 12, Calif. [1\*]

In the District Court of the United States in and for the  
Southern District of California, Central Division  
September, 1946, Term

No. 19055

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THEODORE S. GAGE,

Defendant.

### INDICTMENT

[U. S. C., Title 18, Sec. 207—Person acting on behalf  
of United States soliciting and accepting bribe]

The grand jury charges:

### COUNT ONE

[U. S. C., Title 18, Sec. 207]

On or about October 3, 1946, at West Los Angeles, Los Angeles County, California, within the Central Division of the Southern District of California, defendant Theodore S. Gage, being a person acting for and on behalf of the United States in the official capacity of orthopedic physician in the Out-Patient department of the United States Veterans' Administration Center, West Los Angeles, California, under and by virtue of the authority of the United States Veterans' Administration, did ask for a bribe in the sum of \$100.00 from Hubert Tomsone, with intent to have his, the defendant's, decision and

action on matters which may by law be brought before him in his official capacity, namely, matters of prescribing and ordering orthopedic shoes and corrective footwear for the use of patients at said United States Veterans' Administration Center, influenced thereby. [2]

## COUNT TWO

[U. S. C., Title 18, Sec. 207]

On or about October 18, 1946, at West Los Angeles, Los Angeles County, California, within the Central Division of the Southern District of California, defendant Theodore S. Gage, being a person acting for and on behalf of the United States in the official capacity of orthopedic physician in the Out-Patient department of the United States Veterans' Administration Center, West Los Angeles, California, under and by virtue of the authority of the United States Veterans' Administration, did accept and receive a bribe in the sum of \$100.00 from Hubert Tomsone, with intent to have his, the defendant's, decision and action on matters which may by law be brought before him in his official capacity, namely, matters of prescribing and ordering orthopedic shoes and corrective footwear for the use of patients at said United States Veterans' Administration Center, influenced thereby.

A True Bill.

R. W. BLANCHARD

Foreman

JAMES M. CARTER

United States Attorney

[Endorsed]: Filed Nov. 27, 1946. [3]

[Minutes: Monday, December 2, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming for for arraignment and plea of defendant Theodore S. Gage; N. W. Neukom, Assistant U. S. Attorney, appearing as counsel for the Government; Ward Sullivan, Esq., appearing as counsel for the said defendant, who is present:

The defendant states his true name is as set forth in the Indictment, and being informed that he is entitled to a jury trial and to be represented by counsel; and his attorney having waived reading of the Indictment, the defendant pleads not guilty to each of the two counts.

It is ordered that the cause is hereby set for trial on Dec. 10, 1946, at 10 A. M. [4]

---

[Minutes: Tuesday, December 10, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for trial of defendant Theodore S. Gage; N. W. Neukom, Assistant U. S. Attorney, appearing as counsel for the Government; Ward Sullivan, Esq., appearing as counsel for the said defendant, who is present in custody; at 10 A. M. it is ordered that the cause is hereby continued to 2 P. M.

At 3:20 P. M. court reconvenes herein and all being present as before, it is ordered that a jury be impaneled for the trial of this cause, whereupon the clerk draws the names of the following twelve jurors, who take their

places in the jury box: Wm. H. Shonk, John V. Baldwin, Carroll Ridgway, Geo. D. Uhl, Helen Mellinkoff, J. C. Lov, Albert H. Loeffler, James Joseph Doyle, Patrick J. Conroy, Paul G. Schmitz, Chas. R. Hine, and Harry D. Dudding.

The said jurors now in the box are examined for cause and passed.

Albert H. Loeffler is excused on plaintiff's peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of Walter Frederick Amling who is examined for cause and passed.

John V. Baldwin is excused on defendant's peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of C. Eugene Houston, who is examined for cause and passed.

Helen Mellinkoff is excused on plaintiff's peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of Agnes J. Breen, who is examined for cause and [5] excused for cause by the Court. It is ordered that another name be drawn, whereupon the clerk draws the name of Margarita Brun, who is examined for cause and passed.

J. C. Love is excused on defendant's peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of Lillian M. Norris, who is examined for cause and passed.

C. Eugene Houston is excused on plaintiff's peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of Alfred F. Chase, who is examined for cause and passed.

Wm. H. Shonk is excused on defendant's peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of Andrew Morrison, who is examined for cause and passed.

And there being no further challenges the jurors now in the box are accepted and sworn as the jury for the trial of this cause, viz.:

### THE JURY

- |                       |                      |
|-----------------------|----------------------|
| 1. Andrew Morrison    | 5. Margarita Brun    |
| 2. Alfred F. Chase    | 6. Lillian M. Norris |
| 3. Carroll Ridgway    | 7. Walter F. Amling  |
| 4. George D. Uhl      | 8. Jas. Jos. Doyle   |
| 9. Patrick J. Conroy  |                      |
| 10. Paul G. Schmitz   |                      |
| 11. Chas. R. Hine     |                      |
| 12. Harry D. Dudding. |                      |

It is ordered that the jurors present, who were not impaneled for the trial of this cause, are excused until further notice.

Attorney Neukom makes opening statement to the jury in behalf of the Government. Attorney Sullivan declines to make an opening statement, reserving said right until close of the Government's case.

Alvin O. Mark (832 S. Taylor, Montebello, Calif.) is called, sworn, and testifies for the Government and U. S. Exhibit 1 is offered and admitted in evidence.

Gordon L. Howe (290 Veterans' Hospital, Sawtelle, Calif.) is called, sworn, and testifies for the Government, and U. S. Exhs. Nos. 2 & 3 are offered and admitted in evidence.

At 4:35 P. M. the Court admonishes the jury that during the progress of this trial and the recesses therein they are not to speak to anyone or permit anyone to speak to them about this cause or any matter or thing therewith connected; that until said cause is finally submitted to them for their deliberation under the instructions of the Court, they are not to speak to each other about this cause or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally submitted to them, and [6] declares a recess in the trial of this cause until 10 A. M. December 11, 1946. [7]

---

[Minutes: Wednesday, December 11, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for further trial of the defendant Theodore S. Gage; Norman W. Neukom, Esq., Asst. U. S. Attorney, appearing for the Government; Ward Sullivan, Esq., appearing for the defendant; the defendant being present and the jury being present; it is ordered that trial proceed.

Witness Howe resumes the stand and testifies further.

Frank L. Long (Chief Medical Examiner, Veterans' Administration, Sawtelle) is called, sworn, and testifies for the Government. U. S. Exhibits 4 and 5 are offered and admitted into evidence.

At 11:15 A. M. the Court admonishes the jury and declares a recess. Court reconvenes at 11:25 A. M.; all present as before; the defendant and jury are present.



Witness Long resumes the stand and testifies further.

Hubert Tomson (426 So. Hillview, Los Angeles) is called, sworn, and testifies for the Government. U. S. Exhibit 6 is offered and admitted into evidence.

At 12 o'clock noon Court recesses until 2 P. M. Court reconvenes at 2 P. M.; all present as before, the defendant and jury are present.

Witness Tomson resumes the stand and testifies further. U. S. Exhibit 7 is offered and admitted into evidence.

At 3 P. M. Court recesses and reconvenes at 3:25 P. M.; all present as before, the defendant and jury are present. [8]

Witness Tomson resumes the stand and testifies further.

Charles M. Duncan (36 Veterans' Administration Center, Sawtelle, California) and Howard H. Davis (Special Agent, F.B.I., 900 Security Bldg., Los Angeles) are respectively called, sworn, and testify for the Government.

U. S. Exhibit 8 is offered and admitted into evidence.

Paul Mallory (259—25th St., Los Angeles) is called, sworn, and testifies for the Government. U. S. Exhibit 9 is offered and admitted into evidence. The Government rests.

Attorney Sullivan waives opening statement in behalf of the defendant. Herbert Alton Amrein (866 Westmount Drive, Los Angeles) is called, sworn, and testifies for the defendant.



Melvin Kramer (1434 Kelton, Los Angeles) and Nell Lifland (6454 San Vicente Boulevard, Los Angeles) are respectively called, sworn, and testify for the defendant.

Dr. Theodore S. Gage (2509 Santa Monica Boulevard, Santa Monica) is called, sworn, and testifies in his own behalf.

At 4:25 P. M. the Court reminds the jury of the admonition heretofore given and recesses herein to 10 A. M., December 12, 1946. [9]

---

[Minutes: Thursday, December 12, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for further jury trial of defendant Theodore S. Gage; N. W. Neukom, Assistant U. S. Attorney, appearing as counsel for the Government; Ward Sullivan, Esq., appearing as counsel for the said defendant, who is present on bond; and counsel stipulating that all are present as before, it is ordered that the trial proceed.

Defendant Gage resumes the stand and testifies further on direct examination and Defendant's Exhibit A is offered and marked for identification.

At noon court recesses until 2 P. M. At 2:15 P. M. court reconvenes and all being present as before, Defendant Gage resumes the stand and testifies further on cross-examination.

Chas. Emerson Strachan (2864 The Malle, Los Angeles) is called, sworn, and testifies for the defendant.

David I. Levine (6417 Lexington, Los Angeles) is called, sworn, and testifies for the defendant.

At 3 P. M. court recesses. At 3:30 P. M. court reconvenes and all being present as before, witness Levine resumes the stand and testifies further on direct examination.

Theodore J. Kane (632 N. Kings Road, Los Angeles) is called, sworn, and testifies for the Government.

Robert Mazet (703—24th St., Santa Monica) is called, sworn, and testifies for the defendant.

Fred Skill (119 West Broadway, Long Beach, Calif.) is called, sworn, and testifies for the defendant. [10]

Allen E. Curry (670 Shatto Pl., Los Angeles) is called, sworn, and testifies for the defendant.

Carl Kancheff (320 S. Fremont, Los Angeles) is called, sworn, and testifies for the defendant.

Leicester C. Chapman (Veterans' Administration, Sawtelle, Calif.) is called, sworn, and testifies for the defendant.

Kenneth Townsend (9949 Santa Monica Blvd., Beverly Hills) is called, sworn, and testifies for the defendant.

Arthur J. Nie (1050 Marco, Venice, Calif.) is called, sworn, and testifies for the defendant and Defendant's Exhibit A, heretofore marked for identification, is now offered and admitted in evidence. The defendant rests.

Witness Long is recalled and testifies in rebuttal in behalf of the Government. Witness Davis is recalled and testifies in rebuttal in behalf of the Government. Witness Duncan is recalled and testifies in rebuttal in behalf of the Government.

John Harder (1423 Ridgway, Los Angeles) is called, sworn, and testifies for the Government in rebuttal.

Pete La Tora (1835 W. 38th Pl., Los Angeles) is called, sworn, and testifies for the Government in rebuttal. Both sides rest.

At 4:50 P. M. the Court reminds the jury of the admonition heretofore given and declares a recess until 9:30 A. M., Dec. 13, 1946. [11]

---

[Minutes: Friday, December 13, 1946]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for further jury trial of defendant Theodore S. Gage; N. W. Neukom, Assistant U. S. Attorney, appearing as counsel for the Government; Ward Sullivan, Esq., appearing as counsel for the said defendant, who is present on bond; at the request of Attorney Neukom the Indictment is read by the clerk of the Court. Attorney Neukom makes opening argument in behalf of the Government. Attorney Sullivan argues in behalf of the defendant. Attorney Neukom makes closing argument in behalf of the Government.

At 11:05 A. M. the Court reminds the jury of the admonition heretofore given and declares a recess for a few minutes. At 11:45 A. M. court reconvenes and all being present as before the Court instructs the jury.

At 12:12 P. M. Bailiffs Brand and Strong are sworn to care for the jury during its deliberations upon its verdict and the jury thereupon retires to the juryroom in the custody of the said bailiffs.

At 12:15 P. M. the Court orders the jury taken to lunch and thereafter to return to the jury room for deliberation upon its verdict.

At 3:39 P. M. court reconvenes and all being present as before, including the defendant and the jury, and counsel so stipulating, the Court inquires of the jury if it has reached a verdict and the foreman replies that the jury has, and hands the verdict to the Court who thereupon orders that it be read in open court. The clerk reads the verdict and the Court orders that the jury be polled and each juror having replied that the verdict as read is his or her own verdict, it is [12] ordered that the said verdict be filed and spread upon the minutes, the said verdict as filed being as follows:

\* \* \* \* \*

The Court orders the defendant committed to the custody of the U. S. Marshal and defendant's bond exonerated.

The jurors herein are excused from further attendance upon the Court in this case and are excused generally until notified.

On the Court's own motion it is ordered that this cause be referred to the Probation Officer for investigation and report and continued hereby to Dec. 30, 1946, at 2 P. M., for hearing the said report and for sentence on each of the two counts of the Indictment.

On motion of Attorney Neukom it is ordered that the \$100 in currency, marked as U. S. Exhibit 7, remain in the custody of the clerk until the date of sentence and time for appeal has expired. [13]

[Title of District Court and Cause]

VERDICT

We, the Jury in the above-entitled cause, find the defendant, Theodore S. Gage, guilty as charged in the first count of the Indictment, and guilty as charged in the second count of the Indictment.

Dated: Los Angeles, California, December 13, 1946.

HARRY D. DUDDING

Foreman of the Jury

[Endorsed]: Filed Dec. 13, 1946. [14]

---

[Title of District Court and Cause]

MOTION IN ARREST OF JUDGMENT

Comes now the defendant and moves in arrest of judgment on the following grounds, to-wit:

I. The indictment does not state facts sufficient to constitute an offense against the United States;

II. The court was without jurisdiction of the so-called offense in that the so-called offense, if any, does not come within U. S. C., Title 18, Sec. 207;

III. That the defendant was not properly represented at the trial in that all of the evidence available to counsel for the defendant was not submitted;

IV. That the defendant was not properly represented at the trial in that counsel for the defendant failed to make an opening statement to the jury, failed to make a motion for a nonsuit, failed to make a motion for a directed verdict, failed to [15] make a motion in arrest

of judgment, failed to make a motion non obstante veredicto, and failed to make a motion for a new trial.

Dated this 30th day of December, 1946.

JOSEPH J. CUMMINS

Attorney for Defendant, Theodore S. Gage

Received copy of the within Motion in Arrest this 30 day of Dec. 1946. N. W. Neukom, Asst. Attorney for .....

[Endorsed]: Filed Dec. 30, 1946. [16]

---

[Title of District Court and Cause]

### MOTION FOR NEW TRIAL

Comes now the defendant and makes this motion for a new trial on the following grounds, to-wit:

I. The court erred in excluding the evidence of John Doe Skill;

II. The verdict was contrary to the law and the evidence;

III. The presumption contained in the statute, as construed and applied in this case, is unconstitutional;

IV. Newly discovered evidence;

V. The defendant was denied due process of law, as guaranteed by Amendment V and Amendment VI of the Constitution of the United States.

Dated this 30th day of December, 1946.

JOSEPH J. CUMMINS

Attorney for Defendant, Theodore S. Gage [17]

Received copy of the within Motion this 30 day of Dec., 1946. N. W. Neukom, Asst. Attorney for .....

[Endorsed]: Filed Dec. 30, 1946. [18]



[Title of District Court and Cause]

MOTION

Comes now the defendant, Theodore S. Gage, and moves the court for judgment of acquittal on each count of the indictment.

Dated this 30th day of December, 1946.

JOSEPH J. CUMMINS

Attorney for Defendant, Theodore S. Sage [19]

Received copy of the within Motion this 30 day of Dec., 1942. N. W. Neukom, Asst. Attorney for .....

[Endorsed] Filed Dec. 30, 1946. [20]

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[Title of District Court and Cause]

AFFIDAVIT OF JOSEPH J. CUMMINS IN SUPPORT OF MOTION FOR NEW TRIAL, MOTION IN ARREST OF JUDGMENT, AND MOTION FOR ACQUITTAL

State of California

County of Los Angeles—ss:

Joseph J. Cummins, being first duly sworn, deposes and says:

That he is an attorney at law, duly licensed to practice in all of the courts of the State of California and in the District Court of the United States, Southern District of California, Central Division, and in the United States Circuit Court of Appeals for the Ninth Circuit.

1. That on or about December 20, 1946, affiant was requested by a physician, a classmate of the defendant in medical school, to visit the County Jail where the defendant, Theodore S. Gage, is incarcerated. That at such time and place the defendant, Theodore S. Gage, recited the story of his employment at the Veterans' Administration at Sawtelle, County of Los Angeles, [21] California, from the time he was first there employed up to and including defendant's trial and conviction under the Indictment under U. S. C., Title 18, Sec. 207.

2. Affiant avers that at said time and place defendant requested affiant to make a personal investigation of the statements made to affiant by defendant, and that affiant, if convinced of defendant's sincerity, honesty and truthfulness, substitute himself in *in* the place and stead of defendant's then counsel.

3. Affiant avers that on or about the 28th day of December, 1946, affiant filed Substitution of Attorneys with the Clerk of the within Court.

4. Affiant avers that he has made an exhaustive investigation and check of the statements made to him by the defendant, and that said statements, in their important details, have been corroborated by disinterested persons, for the most part professional men employed by the government of the United States at the Veterans' Administration at Sawtelle, Los Angeles County, California.

5. Affiant avers that he had conversations with Dr. Ralph H. Kuhn, Dr. David Levine, Dr. Theodore Kane, Dr. Charles Strachan, Dr. M. J. Hurst, Col. Colebaugh, Lt. Col. Strayder, Mr. Fred Skill, and the lieutenant in charge of the records in the office of Chief of Police A.



F. Slaight of Long Beach, Los Angeles County, California.

6. Affiant avers that in a conversation with Dr. David Levine, Dr. Levine disclosed to affiant that the defendant Gage on more than one occasion stated to him (Dr. Levine) in the presence of Drs. Kuhn, Kane, Strachan, and perhaps Dr. Nigh, that he (defendant Gage) was working on something and/or was making an investigation with respect to what he suspected to be a pay-off by Tomsone, and that when he had concluded the said investigation there would be "fur flying" or there would be "hell popping", or [22] words to that effect. Affiant avers that he presented the within statement of Dr. Levine to Drs. Strachan, Kane and Hurst; that the said latter three doctors informed your affiant that they clearly remember defendant Gage making said statements in their presence and in the presence of each of them on "two or three occasions".

7. Affiant avers that Dr. M. J. Hurst stated to your affiant that defendant Gage told him that he (defendant Gage) suspected that Tomsone was paying somebody off and that he (defendant Gage) was trying "to get him".

8. Affiant avers that from affiant's conversations with various members of the medical staff of the Veterans' Administration hospital at Sawtelle, County of Los Angeles, California, it was common knowledge that the defendant was making a one-man investigation of what he suspected, to-wit, that said Hubert Tomsone was paying somebody off in order to preserve his (Tomsone's) exclusive contract with the Veterans' Administration for orthopaedic equipment. Affiant further avers that there

were at least three conversations at the Veterans' Administration hospital, where defendant was employed, at which defendant Gage stated to his colleagues there assembled (to which two of the doctors referred to as "bull sessions") that he (Gage) was making an investigation of alleged graft or pay-off and that when he (Gage) would have concluded said investigation there would be "fur flying" or "hell popping", or words to that effect.

9. Affiant avers that he was informed by at least three physicians who are still employed at the Veterans' Administration that defendant Gage stated to them that he (Gage) had written to Washington in this regard and that a response to defendant's letter had been received from Washington; that the said letter was intercepted by Dr. Long, defendant's superior, and that Dr. Long had called the defendant "on the carpet" for going over his head and for not "going through channels". [23]

10. Affiant is informed and believes, and upon such information and belief states, that the government's chief witness, Hubert Tomsone, was twice convicted of theft and served two sentences in the Long Beach City Jail as the result of such convictions; that affiant believes that the record of such convictions would be admissible under *Williams v. U. S.*, 3 F. (2d) 129, to impeach the character, testimony and credibility of the government's chief witness; that the jury was deprived of such evidence in weighing the testimony and credibility of the witness Tomsone.

Further deponent saith not.

JOSEPH J. CUMMINS

Subscribed and sworn to before me this 8th day of  
January, 1947.

AARON J. BLACKMAN

Notary Public in and for the County of Los Angeles,  
State of California

[Endorsed]: Filed Jan. 8, 1947. [24]

---

[Title of District Court and Cause]

TRANSCRIPTION OF CONVERSATIONS BE-  
TWEEN JOSEPH J. CUMMINS AND DOC-  
TORS THEODORE KANE, CHARLES STRAC-  
HAN, DAVID LEVINE, M. J. HURST, COL-  
ONEL STRAYDER AND RALPH H. KUHN [25]

Transcription of Conversation Between  
Joseph J. Cummins and Dr. Kane

December 26, 1946

Dr. K Hello.

JJC Hello, Dr. Kane. My name is Joseph Cummins.  
I'm an attorney and also the editor of the B'nai  
B'rith Messenger.

Dr. K Yeh.

JJC I've been called in in the Dr. Gage matter to  
compile statements which Dr. Gage has made to  
me—are accurate, such as for example:

1. Dr. Gage tells me that he told you and per-  
haps Dr. Kuhn and Dr. Levine and Dr. Strachan  
that he had complained to Dr. Long that this

man Tomsone was trying to bribe him. Did he ever make such a statement to you?

Dr. K Not to me, no. No, look all that came up in the trial. The only thing that Levine, Kuhn and myself could testify to—and I think the testimony bears us out—was the fact that he went ahead and he did complain that the quality of Tomsone's work was not satisfactory and that on several occasions he'd gone ahead and complained about Tomsone's work and they'd gone ahead and stepped over his head and authorized certain stuff which he had refused, but as far as his bribing, he never mentioned it to me. I don't think he mentioned it to Kuhn and I don't think he mentioned it to Levine.

JJC Well was there any conversation around there about the word "bribery", doctor?

Dr. K No.

JJC And not to your knowledge—

Dr. K No.

JJC Uh huh. Did you— [26]

Dr. K That came out in the trial.

JJC Did you so testify at the time of trial?

Dr. K Not that I hadn't heard—that he hadn't told us. He had told us about the fact that he had raised "Hail Columbia" about Tomsone's work. Yes.

JJC Did you so testify?

Dr. K Yes.

JJC And did they ask you specifically whether or not you ever heard Dr. Gage complain about the fact that Mr. Tomsone was trying to bribe him?

Dr. K I think they did ask us that, yes.

JJC And did you—pardon.

Dr. K The answer to that I believe was that I didn't recall such a conversation.

JJC Uh huh.

Dr. K And I'd like to help the boy as much as I could but—

JJC Naturally and I don't want you to testify to anything that—

Dr. K We went up there and the things we did testify up there—are as I'm telling you now—about the fact that he had complained about the quality of his work and that he had told us that he had told the higher-ups about it and stuff like that—I mean it was just the stuff that we had testified to at the trial.

JJC Uh huh. Naturally I want you to understand me in this matter. I wouldn't ask you—

Dr. K I realize that.

JJC I wouldn't ask you to perjure yourself if his life were at stake. The only thing is that I did want to get—you know as we say in the law—the truth, the whole truth and nothing but the truth. All—

Dr. K As far as the statements were concerned we hadn't heard—he may have thought he mentioned them to us because after [27] all we did use his room as a sort of hang-out in the morning and kid around for five or ten minutes when we first started the day. He may have thought he told us about it but he didn't mention—because if he

did we would have probably told him to (record not readable) we would have fought about it or do something about it. We wouldn't let him go along the way he went. And I don't believe that any one of us—that

JJC Doctor, may I ask you this as man to man—and take it as such? Did (not readable) in the opinion of the boys out there—I don't want to get involved in a lost cause. Do they think he's guilty?

Dr. K They said he was a damn fool.

JJC Uh huh.

Dr. K That he may have tried to bust this thing wide open himself, but he sure used poor tact in doing it the way he did.

JJC Uh huh. Do they think that he is a grafter, the boys? Or just a damned fool?

Dr. K If he did I think it was something that was an emotional strain that came on afterwards. I think originally his intentions were probably all right and instead of trying to bust it himself—which was the impression he told us afterwards—was that they jumped the gun on him. I mean it was the feeling we had—that if he did try to bust this wide open he went about it in the—how should I word it—they jumped the gun on him—suppose I put it that way. And, but we feel that technically that Ted Gage was all right.

JJC Did the boys feel that his intentions were good?

Dr. K Yes, that his intentions were good.



JJC Uh huh.

Dr. K Whether anything actually happened afterwards or not, it may [28] have been one of those emotional things. A fellow comes back and makes a go of things and suddenly says "Ah, the hell with things. I can't seem to get to first base with the proposition. I go to the higher-ups and they don't do anything about it. The devil with it." Now whether that was the final thing or not I don't know. See what I mean?

JJC Uh huh.

Dr. K Well the fact remains he did take the money and he admitted it and they found it on him.

JJC He claims he was going to turn it in and they stopped him in the hallway and he talked and didn't get a chance to turn it in.

JJC Uh huh.

Dr. K I don't want to go pro or con on—but we like the fellow. That, of course, biases us a little bit.

JJC Yes.

Dr. K He is an extrovert and a good jovial sort of a fellow and we all liked him.

JJC Yes.

Dr. K There's the point. I think that basically he was foolish and in fact when I use the term "extrovert"—I mean that just about described him—a happy go lucky robust fellow, who doesn't care who he talks to, or what he says, and a likeable chap.

JJC Did you find him to be one of these reforming sort of fools? Going around trying to reform everybody and everything with which—with whom he came in contact?

Dr. K No, not necessarily a reformer. I mean—my contact with him medically. He—he wanted to practice good orthopaedics down there and he didn't like the rules and regulations that would bind him down. I mean he felt that if he wanted to do certain treatment he didn't have to abide by [29] the law or the letter there and say "Well you can't get it because you were discharged yesterday instead of tomorrow", or something like that. See what I mean.

JJC You bet.

Dr. K He practiced good orthopaedics. We really felt that he was a competent orthopaedic man—so that if any problems that come up from an orthopaedist's view point (not readable) sort of overlooked the little points of technicalities, whether the man was entitled to it or not. If we said "We have a case here Gage and we'd like you to do something" he'd go ahead and do it. He didn't ask if he was eligible for it or not.

JJC Uh huh.

Dr. K That's the kind of a guy he was.

JJC Uh huh. He is capable in his profession?

Dr. K I think if he did anything why he did it more as a sort of—well how should I word it—one of those crazy things that sometimes somebody does. Basically I don't think he is guilty.



JJC Uh huh.

Dr. K That's just my personal opinion—because if he was there were a lot of other chances, he could have done a lot of things down there.

JJC Uh huh. Well frankly, doctor, I appreciate your sincere and honest expression, but it's not grounds upon which to predicate a new trial.

Dr. K I don't know anything technical or legal about it.

JJC I know. I understand.

Dr. K I'm just (not readable) actually what we actually testified to in court—was that we knew him, he was a good doctor and that was all. [30]

JJC Uh huh.

Dr. K Theoretically I suppose we were character witnesses. But other than that we didn't know anything. I mean it amazed us when it actually happened. We had no—I had no inkling, of course, that anything like that was going on.

JJC Uh huh.

Dr. K At the time it did happen I said "Well if he did, he sure is a damned fool" and that was our impression, but we have always felt that we should give him the breaks on it and feel that he didn't do anything out of the way. But beyond that I really don't know what actually went on there, other than what's hearsay, and what I listened to at the trial.

JJC Uh huh.

Dr. K There's the story.

JJC But to the best of your knowledge he never came to you and complained that Tomsone was trying to bribe him.

Dr. K No, all he did was complain about the quality of his work. He did complain plenty about his work, that it was no good.

JJC He did, eh?

Dr. K Yeh. He was always complaining about the quality of his work.

JJC Uh huh. And were any of the other doctors there?

Dr. K If I'm not mistaken there would be half a dozen of us in the room. He'd come in and say "Well, gee whiskers, I had a case yesterday or this morning, or something, and that was sure a lousey job. He sure does this and he sure does that." I mean it was just general conversation.

JJC Uh huh.

Dr. K Nothing specific—I can't remember what day, or what case, or anything about it. Just general conversation.

JJC Uh huh. [31]

Dr. K But he would—

JJC He did, eh?

Dr. K Yes.

JJC Well thank you, doctor, and I hope to meet you personally some day.

Dr. K O. K.

JJC Good-bye. [32]

Transcription of Conversation Between  
Joseph J. Cummins and Dr. Strachan  
January 2, 1947

The first part of the record is not readable.

JJC Well you say he complained about Tomsone's work. The work was bad and that—did he say "He'd like to have a change—would like to have somebody else do it, or this, or that"?

Dr. S Oh, yes, things similar to that. Yes, that's true.

JJC Uh huh. He never mentioned to you that Tomsone was trying to bribe him?

Dr. S No, he did not.

JJC He said he mentioned it to a couple of the boys. I don't know whether you were meant amongst those couple of the boys.

Dr. S He never made any such statement to me at any time. I'm sure of that.

JJC Uh huh. I know that you'd be frank in stating so, doctor, if he had. Now may I ask you another question, doctor? I, of course, don't want to get involved in a losing cause and therefore I'm asking these questions because they'll guide me in whether I want to become affiliated with the case and help make a motion for a new trial, on the grounds of newly discovered evidence. That's—you know—one of those legal things.

. . .

JJC Did—I'll approach it from this angle. What's the general consensus of opinion among the fellows out there? Do they think he's guilty?

Dr. S Well, here—most of us that were in court and heard the testimony—I mean heard part of the testimony, thought he had a awful tough case to beat and we didn't think he had [33] much of a chance of getting anything but . . . what he got.

JJC Uh huh.

Dr. S Now, whether he's guilty or not, I don't know. That's something that's in his own mind and he knows the answer to that and nobody else does.

JJC Yes, he's about the only one, that's right.

Dr. S I couldn't say whether he's guilty or whether he's not guilty, but it would be a tough case for you to beat.

JJC Yes, I think so.

Dr. S The evidence is awfully strong—

JJC Yes, awfully strong against him.

Dr. S And I doubt if he could win an appeal.

JJC Oh, as its sits right now, I doubt it too. The only chance would be a motion for a new trial and that would be on the grounds of newly discovered evidence and, of course, that would have to be predicated upon some testimony that Mr. Sullivan didn't elicit at the time of the trial, such as the boys knew that he was trying to show it up because he told some of the fellows . . .

Dr. S That was the weakest point in his whole case. He said that he was playing private detective, but as far as I know he confided in no one, that he was trying to trap Tomsone.

JJC Uh huh.

Dr. S And that's . . . that's . . . if you could establish evidence that he was playing private detective and he accepted the money only—only to get Tomsone—to trap him—you'd have a case.

JJC Yes, that's right.

Dr. S For all I know, there is no such person in existence.

JJC Uh huh.

Dr. S And there's another thing that kind of weakens the case. [34] and that is that it was important enough for him to go downstairs to get a cup of coffee when there were a lot of patients waiting; it was important enough for him to go out to his car to get some papers that he was working on, while there were patients waiting, but after he had the money in his pocket, there were a lot of patients waiting in the hall and they were more important than getting rid of the guilt—getting rid of the money . . . and that is a hard thing to beat.

JJC That's a hard thing to try to make a jury swallow.

Dr. S That's right. I think that was the thing that swung the jury.

JJC Uh huh.

Dr. S I'd like to see him get off and I hope that—I hope there's some way out for him; and I'll never do anything to hurt him in any way, because as far as his treatment of me is concerned I never,

never saw anything out of the way; I never saw him do anything out of the way. I had no reason to believe he's guilty, but the evidence is—

JJC     The evidence is very damning.

Dr. S    That's right.

JJC     Yes sir.

Dr. S    He treated me fine. I have no complaints against him at all and I think he was trying to do a job out there.

JJC     He is a damned good orthopaedist, isn't he?

Dr. S    Yes, he is pretty good.

JJC     And, of course, it takes about twenty-five years to manufacture a good orthopaedic surgeon and you hate to see them guillotined by one mistake like that. But—

Dr. S    I hated—I mean I was awfully sorry to hear that he did get a conviction, but several of us that knew him fairly well out there—I mean—I didn't know him very well—I [35] just knew him for a couple of months—but the ones that were closest to him out there—we were talking about it the day before, and we didn't see how he could get out of it. . . . It was almost open and shut. The FBI had the evidence and he didn't have much to refute it on.

JJC     Yes, that's right. It was his word against Tomsone's.

Dr. S    Yeh, and Tomsone was working with the FBI for three weeks before . . . and Gage was working on his own. If he had confided in one

person—and told just one person about—Tom—  
sone was offering him bribes, I think it would  
have helped his case a lot.

JJC Uh huh.

Dr. S I don't know that person.

JJC Uh huh.

Dr. S But I hope you can help him out.

JJC I hope I can too doctor, but frankly the odds are  
awfully great against him.

Dr. S That's right.

JJC Well thank you so much, doctor. You've been  
very kind and frank and helpful.

Dr. S All right.

JJC Thank you and a very Happy New Year to you  
and your family.

Dr. S Thank you, the same to you.

JJC Thank you, good bye. [36]

Transcription of Conversation Between  
Joseph J. Cummins and Dr. Levine

December 26, 1946

JJC Hello, doctor. My name is Joseph Cummins. I'm  
a lawyer and also the editor of the B'nai B'rith  
Messenger.

Dr. L I see.

JJC I've been asked to help to see if something  
couldn't be done for Dr. Gage.

Dr. L Oh, yes.



JJC And frankly as a Jew and a Jewish newspaper man I'm sympathetic. As a lawyer I have to face the facts and the law.

Dr. L I understand.

JJC And I wanted to ask you in all candor a couple of general important questions which might determine my decision whether or not I'll become involved in the case. That is, associated in the case.

Dr. L I'll try and help you.

JJC Right—Now I want you to know from the outset doctor that I don't want a damned thing from you that isn't the truth, the whole truth and nothing but the truth.

Dr. L You wouldn't get it.

JJC That's right. But I . . . even if I thought I could . . . I want you to know in advance that I'm not that kind of a guy. I'm not going to ask you to perjure yourself as—if his life were at stake—because you are a married man with a family and your whole future ahead of you, and if one man has made mistakes you don't have to stick your head in a noose to help him out. That's his funeral.

Dr. L Well I let him know that when he came to me originally . . . prior to the trial. [37]

JJC Uh huh.

Dr. L I told him I'd tell exactly what I knew and he didn't expect any more.



JJC Right. That's all I ever expect is the "emess" (Hebrew for absolutely truth). Now, doctor, this is a very important question and upon this question might turn whether or not we can get him a new trial.

Dr. L Uh huh.

JJC Did he ever, at any time, say to you that Tomsone was trying to bribe him?

Dr. L No.

JJC Did he ever indicate by any words that somebody was trying to give him some money?

Dr. L Not to my knowledge, no.

JJC Did he ever complain to you how bad Tomsone's shoes were?

Dr. L Oh yes, yes he mentioned that not only in my presence but that and several others at the same time.

JJC He did.

Dr. L Oh, yes.

JJC On more than one occasion?

Dr. L On several occasions.

JJC Uh huh. And did he say what he was going to do about it?

Dr. L Yes, he mentioned the fact that—that there was something . . . there was something fishy in Denmark—if I may use that term—

JJC Well sure.

Dr. L And that he was finding out certain things that were going on, and . . . although he didn't expand upon that—

JJC Uh huh.

Dr. L And that as a consequence there would probably be some fire works. That's about the way he put it. [38]

JJC He said there were going to be some "fire works"?

Dr. L Very likely he said there would be.

JJC Uh huh.

Dr. L And then he told me on one occasion that he had sent a letter to Washington.

JJC Uh huh.

Dr. L And, subsequently he told me that he had been called into the chief medical officer's office and had been informed that the chief medical officer there had received a reply to that letter but would not divulge it to him.

JJC Uh huh.

Dr. L The letter, in other words, went through indirect channels. He claims that he never saw that letter. That he never personally received a reply to it from Washington which was—made him rather indignant. He felt that this was a personal matter and he told them that he had not gone through channels.

JJC Uh huh.

Dr. L And that therefore the letter had been properly sent through the channels. That is the reply had been properly sent through channels. But he said the contents of the letter were not divulged to him. He was told to . . . more or less . . . keep out of things that didn't concern him . . . Something along that line.

JJC You are referring to Dr. Long.

Dr. L That's right.

JJC Uh huh.

Dr. L This is indirect—this is what Gage told us.

JJC Yes, naturally. "He told us." You mean there were others of you doctors present?

Dr. L Well I don't know whether at the same time or individually, [39] but Dr. Kane, Dr. Strachan, Dr. Kuhn were those to whom he talked mostly.

JJC When he made that statement to the other boys . . . uh . . . did he—were you there—were they there when he said there were going to be "fire works"?

Dr. L That I can't recall exactly.

JJC Uh huh.

Dr. L Because there were so many occasions on which we sort of got together for a little bull session you might say, while coming in and out, going in and out—I don't know—I don't recall each particular instant. But the others all had their say at the same time. I mean when they were on the stand they said substantially the same.

JJC Did you testify too?

Dr. L Yes, I was on the stand.

JJC Did they ask you that question specifically?

Dr. L Which one?

JJC Whether or not he complained to you about—or mentioned to you—that Tomsone was trying to bribe him.

Dr. L Yes, they asked me that question and I had to answer as I told you. That I did not know about that.

JJC Yes. Did you mention the fact the—

Dr. L They did ask me whether he had said in my presence that Tomsone's work was inferior and I said "Yes," because I did hear him say that.

JJC Did they ask you whether—about the "fire works" statement?

Dr. L No nothing was said about that.

JJC Uh huh. . . . Might I use that, because that might be a helpful phrase?

Dr. L Well how do you mean use it?

JJC Well I mean state that he had stated to Dr. Levine in the presence of others that he had written a letter to Washington [40] and that there was going to be some "fire works".

Dr. L Well I wouldn't say it along that—that as a consequence of the letter—there was going to be some "fire works".

JJC Oh! . . . How did he put it, doctor?

Dr. L Oh, he told me—well he mentioned even before that—as I recall it—that he had apparently hit upon something . . . and that he was going to follow it through.

JJC Uh huh.

Dr. L And that subsequently that there would probably be something along that line, but I don't recall—

JJC Uh huh.

Dr. L That wasn't said in reference to his letter to Washington.

JJC Uh huh.

Dr. L That may have preceded or followed that. I don't recall at that time.

JJC Well that's that. Would you have inferred from that doctor that he meant that there would be some "fire works"; that he was going to blow something open—is that the idea? Is that the inference?

Dr. L Well it's possible that that was it. But I couldn't swear to it—if someone asked me specifically just what he meant by it.

JJC Oh! No.

Dr. L I mean (not readable) an opinion and would still be only an opinion.

JJC Just from the inflection of his words and the way he said it, maybe the look on his face—that's what I meant.

Dr. L Now let's see where was I?

JJC After the trial you said—was there some conversation?

Dr. L Well no—I recall now that he made that similar statement after the first day in court. That is when he came down here with the investigator. Prior to my appearing on the [41] stand.

JJC Uh huh.

Dr. L But—or, rather, after his arrest . . . and while he was out on bail, I should say.

JJC Uh huh.

Dr. L About subpoenaing some books, etc., and he expected quite a lot to come out of it. But apparently it failed to materialize because there didn't seem to be any mention—

JJC Uh huh.

Dr. L Now I understood—or am I wrong—that you are going to apply for probation?

JJC Well that won't—that would be—

Dr. L That won't clear him.

JJC Well that won't be of any value at all because probation—he'd still be guilty of a felony and he'd be debarred from ever practicing medicine. His only hope is a motion for a new trial, and—

Dr. L That might take a year or more?

JJC And if granted a new trial and he's exonerated, that is—

Dr. L That's O. K.

JJC Then that is the only hope in the world and I thought if he had told one or two of the boys . . . that . . . as he told me the other day in jail—I went up there with an old classmate of his who's a prominent surgeon here—a classmate of his from Illinois—to whom he wrote a letter—and this surgeon is a client and friend of mine and he wanted to go up and see him so we hopped right in the car and went up to see him . . . and after all I have been in Jewish activities for thirty-one years and I want to be helpful . . . I want to be helpful if a man has a semblance of innocence; and I don't like to see a surgeon (record not readable) a quarter of a century (record not readable) . . . an [42] orthopaedic surgeon from the time he goes into school until he comes out and gets his practice and this and that—I don't like to see him guillotined by one little mistake—but the law doesn't take cognizance of one little mistake—a mistake is a mistake and there is no relativity about it—see—but if he told one or two of the boys that this fellow Tomson is trying to bribe me—as he told me in jail—that's what happened—that's his story.

Dr. L I can't say that he ever mentioned that to me. Or I would have admitted it on the stand.

JJC Right, right, that's right.

Dr. L And . . . as a fact I don't think any of the others mentioned that it was—that he brought that fact out.



JJC But he did state to you, and maybe a couple of the others were listening, that "he's going to get to the bottom of the thing and that there'll be some fire works."

Dr. L Something along that line.

JJC To the best of your recollection, doctor, do you remember his expression?

Dr. L Well I said "fire works". Perhaps I should amend that. I mean that—

JJC To the best of your recollection what did he say? Maybe that one little thing—that you think right now is immaterial—might be the saving of Dr. Gage. See?

Dr. L Well you know what I'd probably have to sit down and pour over this thing to try and recall it.

JJC Do that.

Dr. L But at the time it seemed immaterial because it was . . . along the lines of so many other gripes that we have had . . . the thing sort of overlapped.

JJC Uh huh. [43]

Dr. L With one or two of the other fellows that were there at the time and kind of refresh ourselves on it.

JJC Will you do that tomorrow?

Dr. L I'll speak with—

JJC     And I'll give you my office number here and my home telephone number and if there is anything you can do to refresh their memories—you can tell them they're not required to say anything that isn't the truth - - - and of course they won't—I'm not expecting it and they won't. But they might remember some damn fool little thing that he made a statement about—like—"Oh I'm working on something here, and when I get through there's going to be some fire works", and they'll think—they'll pass it off as a piece of bragadoccio of some extrovert, when in the—

Dr. L     If I had any knowledge—anything of that nature which would be of any help I want to produce it. At the same time I'll try to figure out—whether—since I believe the whole trial revolved around intent—did it not?

JJC     That's right.

Dr. L     O. K. Couldn't they very readily claim that what he said at one time, or what he did at another, would have no relevancy—

JJC     They are relevant. They're very material too. You betcha. A course of conduct you see . . . we must contradistinguish between intent and intention. See? And, of course, conduct is a governing thing. Then it becomes a matter of law—not fact alone.

Dr. L     Assuming that a man felt one way at one time—and then another time decided to do just the opposite—

JJC Well, then, it's a question of law and mixed law and fact and it's up to a jury to determine. But in the meantime [44] it's got to be presented in that fashion. And if it wasn't then he is entitled to a new trial on the merits.

Dr. L I'm wondering whether—why his lawyer didn't try to bring that out then.

JJC I have my own opinions. Did you ever hear the famous Greek expression of (Here Mr. Cummins used a Hebrew expression meaning "he fumbled").

Dr. L Heh, heh, heh, quite so.

JJC Yes, sometimes those things happen—see. A fellow fumbles the ball—a Mickey Owen and the World Series turns on it—see . . . and the best of us can make a mistake.

Dr. L Uh huh.

JJC But—

Dr. L If the motion for trial—new trial—goes forward and is granted, is he then freed on bail again?

JJC Then he'll be out on bail again.

Dr. L I see.

JJC See—and if a new trial is granted on the grounds of newly discovered evidence—which this would be—newly discovered evidence—then—ah—there'd be a fifty-fifty chance of him being exonerated.

Dr. L Uh huh.

JJC And that I certainly—if there's that one chance in a million, I'd like to do it because as I said before it isn't easy to manufacture an orthopaedic surgeon—as I told the judge the other day—you could shoot a couple hundred thousand of us lawyers and the world would never miss us, but they would miss ten good orthopaedic surgeons. See?

Dr. L I see.

JJC So, if you'll be kind enough doctor and talk it over with the boys tomorrow—I'll try and get Dr. Kuhn again—and do you perchance know Dr. Nigh's telephone number?

Dr. L Dr. Nigh's? [45]

JJC Yes.

Dr. L No, I'm sorry to say I don't.

JJC Do you happen to know where he lives?

Dr. L He's in West Los Angeles. That is all I know.

JJC Uh huh, well I'll try to get him.

Dr. L That's N-I-G-H you know.

JJC Yes—I'll try and get Dr. Kuhn.

Dr. L You have talked with Dr. Kane.

JJC I have spoken to Dr. Kane and Dr. Strachan.

Dr. L Did they tell you the same thing?

JJC Substantially the same thing, excepting that he overlooked that one point about the: "I'm working on something here and there might be some fire works", or words to that effect. Now, if you fellows could get together and remember—refresh your memory on a little nonsensical thing that you might thing—that is—that could perhaps be the saving.

Dr. L We'd have to refresh because after all at the time it meant nothing to us.

JJC That's right—that's right.

Dr. L Other than just as I said—

JJC Well take my phone numbers doctor—

Dr. L All right.

JJC And I'll appreciate hearing from you during the day or tomorrow night. My office is TRinity 0431.

Dr. L TRinity 0 4 3 1.

JJC Joseph Cummins—C U M M I N S—or my residence is not listed so you better write that down. BRadshaw 24552.

Dr. L 2 4 5 5 2. All right, sir.

JJC Thank you very much, doctor. And a Happy New Year to you.

Dr. L Thank you, the same to you.

JJC Good bye. [46]

Transcription of Conversations Between  
Joseph J. Cummins and Dr. Kuhn

Conversation of January 2, 1947:

JJC My name is Joseph Cummins. I'm an attorney. I've just been substituted in in the Dr. Gage case.

Dr. K Yes.

JJC Are you in a position to speak more or less freely right now . . . I want to ask you a couple of questions.

Dr. K Well—

JJC Or would you rather I spoke to you at home?

Dr. K What's that?

JJC Would you rather I spoke to you at home?

Dr. K Well, I'm not at home very much.

JJC Well, I'll ask you—Frankly, I'm trying to get Dr. Gage a new trial . . . and . . . I spoke to some of the other men in your department and asked them a couple of questions very frankly, and they're on these lines: "Did you ever hear Dr. Gage make the statement that he's making an investigation and that there'll be 'fur flying' or there'll be 'fireworks' or 'hell will be popping', or words to that effect?"

Dr. K Well, I tell you, Mr. Cummins. I don't know that I want to go into this thing. There are a lot of complicating factors entering into it, and I might be willing to talk to you some time but not now and not over the 'phone.

JJC All right. Any way you say, Doctor. Would you be kind enough . . . I gave you my home 'phone number, to call me at your convenience?

Dr. K All right, just one second . . . Now, what's the 'phone number?

JJC My office number is TRinity 0431.

Dr. K Just one second . . . TRinity [47]

JJC 0431.

Dr. K 0431.

JJC My residence is BRadshaw 24552.

Dr. K 245—

JJC 52

Dr. K 24552. I'll call you.

JJC And I'll appreciate it.

Dr. K Thank you.

JJC Thank you, sir.

---

Second Conversation: January 6, 1947

JJC Dr. Kuhn, this is Mr. Cummins.

Dr. K Oh, yes . . . yes. Uh-huh.

JJC This is January 6th, and my affidavits to Judge Hall have to be in on the 8th.

Dr. K Yah, well, now, I'll tell you, Mr. Cummins. I've talked this situation over with some of my people who are rather influential here in the city, and I believe I'd rather keep out of it.



JJC Oh, it's not a question, Doctor, of keeping out of it. I don't want to drag you into anything. I merely want to ask you one question . . .

Dr. K Well, I . . .

JJC And that is this. If you don't want to answer it, it's all right. "Did you ever hear—"

Dr. K Mr. Cummins, I don't care to get into it, and I agreed to call you, but then, talking things over . . . people advise me not to become involved. You see, I've been in court on this case and I feel that I don't care to go again.

JJC Well, "Did you ever here Dr. Gage—" [48]

Dr. K Well, I'll talk to you some other time, Mr. Cummins. Some time possibly when I'm free and you're free.

JJC Well, I'll have to subpoena you, Doctor, and take your deposition.

Dr. K O. K. Goodbye.

JJC Thank you, sir. [49]

Transcription of Conversation Between  
Joseph J. Cummins and Dr. Strayder

(Jan. 2, 1947)

JJC Colonel Strayder, my name is Cummins. I am the new attorney for Dr. Gage.

Dr. S Yes.

JJC He tells me that he had some conversations with you whilst you were out there regarding certain conditions which obtained, that he discussed with

you. Mind you, my purpose in calling you, Colonel, is this. I'm trying to see if I can find sufficient grounds upon which to predicate a new trial, and the Court has given me a couple of weeks to gather this information, if any there is. Did he have any talks with you regarding Tom-sone, whether the—that Tom-sone was trying to bribe him?

Dr. S    No, I didn't know anything about it.

JJC      Did you ever hear him say that he was working on something that might blow the top off the thing?

Dr. S    Well, right after I started to work down there I went off on leave. While I was working down there I didn't know just what was going on. He said the contract for the shoes was not good. He was trying to get the contract broken. He wanted the Government to buy shoes from anybody that would make them. When most of the things happened out there, I was off on leave. (Parts of the conversation too inaudible to be transcribed.)

JJC      Did he ever have any conversations with you, Colonel? Don't think I am trying to harass you or press you. I'm merely gathering information. Did you have any conversations with him wherein he told you that he was working on—making an investigation—or words to that effect?

Dr. S    I didn't know anything about that. While I was down there [50] we established a very nice connection, and as far as I know when I left there

(not audible) . . . When I came back I was transferred to another department . . . I didn't know what he was doing other than I thought he was just working like everybody else, trying to make a go of it. I didn't know he had anything in mind.

JJC Did he complain to you about the type of shoes that Tomson was delivering to the Hospital?

Dr. S Yes, that was common talk . . . Everybody knew that.

JJC Did he express himself that he thought perhaps Tomson was sticking there because he was paying somebody off?

Dr. S Well, he didn't know.

JJC He told me he told you that prior to his arrest.

Dr. S He might have mentioned it to me.

JJC Do you remember him saying that to you?

Dr. S Well, I couldn't say. Really, I wouldn't know for sure whether he did say that.

JJC He told you that he was working—making an investigation—or words to that effect.

Dr. S He talked about it all the time. Whether he had that in mind or not I couldn't be able to say for sure.

JJC Oh, no, of course, you couldn't tell whether he had it in mind. All I wanted to know—

Dr. S He had information there that he told me that he was positive that there was a payoff.

JJC He did tell you that?

Dr. S    He never did, I say.

JJC    He didn't tell you that?

Dr. S    No, he didn't.

JJC    Did he infer that he was working on something to discover that there was a payoff?

Dr. S    No, no, he never did say anything— [51]

JJC    Nothing that even sounded like that?

Dr. S    No, I didn't know that he had that in mind at all.

JJC    What was the worst he said about Tomsone and his shoes?

Dr. S    They were lousy shoes, or words to that effect . . .

JJC    He tells me that he told you that the only way a man could put shoes like that into the hospital is that he was paying somebody off. Do you remember him saying that to you?

Dr. S    He might have, but if he did, of course, that would be merely a supposition.  
(Inaudible conversation)

JJC    How many times did he make such complaints to you?

Dr. S    Oh, I wouldn't know. Probably one or two times, when he'd bring a shoe over there for me to look at . . . he turned them down . . . I wouldn't know. The veteran wouldn't like the shoe and he would bring it back in. He'd send them back and have them fixed over.

JJC    And during that conversation he might have said to you that the only way a man could bring a

shoe like this into the Administration would be that he's paying somebody off, or something like that?

Dr. S I don't recall that. I don't recall him ever saying that. I wouldn't know.

JJC He might have said it?

Dr. S He might have said it in just ordinary conversation . . . He was driving at an investigation—to find out what, I didn't know . . . We couldn't do anything about it. All we could do was holler about it. We all did that. He didn't let the contract. He didn't have anything to say about it.

JJC He had no authority to make or break the contract anyhow.

Dr. S No, no. . . . It didn't matter.

JJC Wasn't it common knowledge among the young doctors there in that department that Gage was working on some kind of an investigation? [52]

Dr. S I couldn't tell you.

JJC In the bull sessions, some of the boys tell me he told them—several admitted—"I'm working on something", or words to that effect, and "One of these days there's gonna be some fireworks around here". Did you hear that?

Dr. S I didn't recall. I don't recall that at all.

JJC You were never in any of those bull sessions, were you?

Dr. S No.

JJC But you do recall that one or two or three times—I think you said once or twice—that he told you that the only way a fellow could bring shoes like that in here would be that he was paying somebody off.

Dr. S No, I don't think so. Whenever he'd say that he just wondered why they allowed such shoes to be made there. But as far as there had ever been any bribery or anything like that, it had never been brought up—at least, not to my knowledge.

JJC Thanks a million, Colonel. You've been helpful and frank. Goodbye. [53]

Transcription of Conversation Between  
Joseph J. Cummins and Dr. Strachan  
January 2, 1947

Dr. S Hello.

JJC Hello, this is Joseph Cummins. Remember I called you last week at home regarding Dr. Gage.

Dr. S Yes.

JJC I just want to ask you another question that didn't come up at that time, doctor. Talking to Dr. Levine and Dr. Hurst they told me something that sounded insignificant to them but it might be an important item, and that's this: That during their bull sessions around the hospital Dr. Gage made the statement on more than one oc-

casion that he is working on something and that one of these days hell will be popping or there'll be fur flying, or words to that effect. Did you hear such a statement?

Dr. S Well I don't remember anything specific.

JJC Not specific, but something that sounded like that.

Dr. S Oh, yes, sort of intimated something like that.

JJC Uh huh. That—you don't remember the exact words—that's what you mean.

Dr. S No I don't remember any exact words.

JJC No. But the idea, you do recall him having made such a statement?

Dr. S Yes.

JJC How many times, Dr. Strachan, would you say he said it?

Dr. S Oh, I can't remember.

JJC Was it more than once?

Dr. S I don't remember that.

JJC But it was at least once.

Dr. S Yes. [54]

JJC Well thanks a lot, doctor. You've been very helpful and I appreciate it.

Dr. S You're welcome.

JJC Thank you, good-bye. [55]



Transcription of Conversation Between  
Joseph J. Cummins and Dr. Hurst

January 2, 1947

Hello.

JJC Dr. Hurst?

Dr. H Yes.

JJC My name is Joseph Cummins. I'm Dr. Gage's new attorney. I wanted to ask you a question, because on this question might be predicated our ability to get him a new trial. Did you ever hear in any of the bull sessions or discussions around there, did you ever hear Dr. Gage say that he was making an investigation, and that there might be "fur flying" or "hell popping", or words to that effect?

Dr. H Yes sir, I heard some—

JJC How many times have you heard him say that?

Dr. H Well I'd say at least two times, maybe three.

JJC Can you recall, doctor, who all was present when he made those statements? Was Dr. Kuhn there?

Dr. H I think he was. I know—

JJC Was Dr. Levine there?

Dr. H I think he was. I know it happened—once when I was—when just the two of us were alone.

JJC Uh huh. Did he ever tell you that he was trying to get Tomsone; that he felt that Tomsone was paying somebody off and he was trying to get him?

Dr. H Yes, uh huh.

JJC How many times did he tell you that?

Dr. H It is difficult for me to say—(record not readable).

JJC In these other conversations—did he ever say “I’m almost through with my investigation and one of these days I’m going to let it pop”, or words to that effect? [56]

Dr. H No, I don’t recall that.

JJC Can you identify possibly some of the men who were present when he made that—the statement about he’s making an investigation? You said you believed Dr. Kuhn was there. Dr. Levine told me he was there and he heard it and he gave me your name and he said he was sure you were there.

Dr. H At least one of the times, just the two of us were together.

JJC Uh huh.

Dr. H And the other times there were others there. I think it was Dr. Levine and perhaps Dr. Kuhn came.

JJC Uh huh, was Dr. Strachan there?

Dr. H I don’t—

JJC Or Dr. Nigh?

Dr. H No, I don’t think Dr. Nigh was.

JJC Uh huh.

Dr. H If he was he might not have heard because he is a little deaf.

JJC Uh huh. Do you remember whether Dr. Strachan was there?

Dr. H I couldn't be too sure of that.

JJC Dr. Levine says he was. That's why I wanted to tie it up with somebody else too.

Dr. H Well he might have been.

JJC You don't remember that?

Dr. H But I'm not too sure that he was.

JJC Well thank you, doctor. I'll let you know what happens and I'm going to try to get him a new trial.

Dr. H Well I hope you're able to.

JJC Because based upon this evidence I don't think all the facts were brought out at the time of the trial.

Dr. H I see.

JJC Thank you very kindly. Doctor, what is your home phone? [57]

Dr. H My home phone is Hillside 2094.

JJC 2094. Thank you. In case I want to call you in the evening.

Dr. H Very well.

JJC Thank you doctor. [58]

Transcription of Conversation Between  
Joseph J. Cummins and Dr. Kane

January 2, 1947

JJC This is Mr. Joseph Cummins again. I spoke to you about Dr. Gage.

Dr. K Yeh.

JJC There's one thing that came up. Dr. Levine called my attention to it and it seemed insignificant to him at the time but it's a very important piece of information in helping to get Dr. Gage a new trial and I want to check it with you. Dr. Levine told me, as did Dr. Hurst, that during one conversation, a bull session so to speak, amongst the fellows in one of the offices there, Dr. Gage made the statement that he's working on something and that—aah—inferring an investigation. That one of these days there'll be "hell popping", or "fur flying", or words to that effect. Were you present when such a statement was made?

Dr. K I don't recall. He, of course, kept bitching all the time about the quality of the work. That was the most of his complaint.

JJC Yes. Yeh, that we know. But the main thing is the inference that he was making a one man investigation. That's what I'm interested in. Do you remember such a statement?

Dr. K Not as such, no.

JJC What—as close to the language as you can get it or recall it—what did he say?

Dr. K I don't recall that particular—I mean we had a lot of sessions up there you know.

JJC Yes. Of course, I don't want you to guess at anything. I want something more or less accurate to the best of your recollection. Were you present at any of those conversations [59] when Gage made the statement "I'm working on something now—it won't be long, and there'll be hell a popping around here, or fur will be flying, or something like that"?

Dr. K I don't recall it as such. I know that he was trying to—how should I word it—he was complaining about the quality of the work, and he was checking on that. That was most of the gist of his conversation. You know that letter that he wrote.

JJC Yes.

Dr. K It was in reference to that.

JJC Uh huh.

Dr. K That was about the only thing that he said he had written in regard to some circular or something. I mean he told us about that. And that was about all. It's apparently all this conversation was in reference to that. He was waiting for that letter to come through or something.

JJC Uh huh.

Dr. K And when he did come he said that that letter had come through.

JJC Uh huh.

Dr. K A day or so before he was picked up here. You know.

JJC Uh huh.

Dr. K But I think it was in reference to that that he did most of his talking.

JJC Uh huh.

Dr. K That was the time he was—

JJC Well, what I was particularly interested in is the statement that he had made in the presence of—he said you were there—and Dr. Levine—and Dr. Strachan recalls it. Dr. Levine recalls it. Dr. Hurst recalls it and they mentioned that they thought that you were there too when he said—My impression was that it was in reference to that letter [60] that he was waiting for word from Washington.

JJC Uh huh. Well, did you get the inference that he was making an investigation—that he was trying to get Tomsone?

Dr. K Well if he got that letter it was in regard to some contracts. That was the letter that he implied—

JJC Uh huh.

Dr. K He was trying to get some information about the contracts—That was the letter—

JJC Well, don't think I'm trying to pin you—

Dr. K But I'm also trying to be fair about it.

JJC Oh, I want you to be fair, and I want you to be as absolutely impartial and objective as you can be, doctor, but I merely want to pin you down if you were present when that particular conversation took place—where Gage stated "I'm working on something fellows, it won't be long now and there'll be hell a popping around here.

Dr. K Not as such. My impression is that any time I heard him make anything—might imply anything like that—was when he was trying to get this letter.

JJC Uh huh.



Dr. K That he had gone around trying to find this circular letter. That it wasn't around. Then he had written to Washington.

JJC Uh huh.

Dr. K Then I remember when he came back and said there had been an answer to that letter and he wasn't told what it was—something like that—I mean the stuff that you already know.

JJC Uh huh.

Dr. K My impression was that he was waiting for that letter and there would be some hell to pay in regard to the contracts, etc. Something he was trying to find out about those—

JJC Uh huh. [61]

Dr. K Gone upstairs looking for them. Couldn't find them and then had written to Washington direct.

JJC Uh huh.

Dr. K That was my impression as to what he was implying.

JJC Well I appreciate it very much, doctor, and thank you very much and a Happy New Year to you.

Dr. K Thank you.

JJC Good-bye. [62]

Recd 1 copy of the within transcription of recorded conversations this 23rd day of January, 1947. James M. Carter, U. S. Attorney; by V. Bonhus.

[Endorsed]: Filed Jan. 23, 1947.

[Endorsed]: Filed Jan. 24, 1947 as Exhibit "B" to Affidavit of Joseph J. Cummins, Esq., Filed Jan. 8, 1947. [63]



[Title of District Court and Cause]

AFFIDAVIT OF HOWARD H. DAVIS IN OPPOSITION TO MOTIONS MADE BY DEFENDANT

State of California

County of Los Angeles—ss:

Howard H. Davis, being first duly sworn, deposes and says:

That he is a Special Agent of the Federal Bureau of Investigation assigned to the Los Angeles Office.

That the interviews of the persons specifically named hereinafter were all conducted on the properties of the Veterans Administration, at a place commonly known as Sawtelle, California, at or between the dates of January 10th to and including January 13, 1947.

1. That pursuant to the directions of Norman W. Neukom, Assistant United States Attorney, your affiant first read the Affidavit of Joseph J. Cummins filed herein and also a portion of the material reflected in Points and Authorities filed by the defendant. That after so doing, your affiant conducted an investigation and interviewed certain persons as will appear more fully hereafter.

2. In interviewing all of the aftermentioned persons, and during the course of such interview, your affiant advised all of said individuals [64] substantially as follows: That Dr. Gage, the defendant, was entitled to any testimony or evidence that they might be able to furnish on his behalf, and that there was no desire to prevent the presentation of any such testimony upon the part of the government, and that they should feel free to give such

testimony if they had it, and that the purpose of the interview by your affiant was to ascertain the true facts within their knowledge.

3. That referring to paragraph designated as 6, page 2 of the Cummins Affidavit, your affiant on or about the 10th day of January, 1947, interviewed Dr. David Levine, having first read said paragraph No. 6 to Dr. Levine. Dr. Levine stated to affiant that part of the material as contained in said paragraph was true and part was not. Dr. Levine further stated that he did not say that defendant said he was making an investigation of a payoff by Tomsone, and that he did not recall in whose presence statements were made. He quoted Dr. Gage as saying that he had stumbled or come upon something in which he was in the process of investigating, and that he, Dr. Levine, believed he, Dr. Gage, had said something in regard to certain alleged irregularities and that after he, Dr. Gage, was through investigating, there would be a big blow up. Dr. Levine advised he did not recall Dr. Gage saying he suspected a payoff by Tomsone, nor that he, Dr. Gage, was investigating it. Dr. Levine further related that Dr. Gage had mentioned that he had written a letter to Washington, the contents of which were not divulged to Dr. Levine, and that later Dr. Gage had told him, Dr. Levine, that Dr. Long had received an answer and had called him in and that they had some words. Dr. Levine advised that it was not common knowledge to him, Dr. Levine, that Dr. Gage was making an investigation of a payoff by Hubert Tomsone. He advised that Dr. Gage complained of Tomsone's work. Dr. Levine stated that the attorney for Dr. Gage, who he described as the "new attorney" had asked him several times if Dr. Gage had

made a statement relative to investigating Tomsone in regard to a payoff and each time he told him, the attorney, no.

4. Dr. Strachan likewise was interviewed after having first had read to him paragraph 6 of the Cummins Affidavit. Dr. Strachan replied substantially as follows:

"That is not what I said. I did not remember any specific [65] statements on his part (referring to Dr. Gage). I did hear him say words that inferred that he felt there was something funny going on and he was trying to get to the bottom of it. It was not particularly in reference to Tomsone. He referred to Milligan as well as the shoe deal. He said several times that he, Dr. Gage, thought that someone higher up in the Administration was being paid. He felt there was some reason Milligan had the contract for the braces and Tomsone for shoes. He had never told one soul, to my knowledge, that Tomsone had ever bribed him in any way. He, Dr. Gage, said he wanted to get Dr. Long and Dr. Willett out of here."

Dr. Strachan stated that after Dr. Gage was apprehended, he asked him, Dr. Gage, if he had taken the money. He stated that he, Dr. Gage, replied that he knew nothing about it. However, according to Dr. Strachan, later Dr. Gage and his attorney stated that he, Dr. Gage, had accepted the money to trap Tomsone. (This statement was made prior to trial, and during the course of investigation.) Dr. Strachan stated that he did not recall any specific statements by Dr. Gage, and that Dr. Gage never mentioned Tomsone specifically but he, Dr. Strachan, al-

ways took his statements to refer to Tomson and Miligan. Dr. Strachan further stated that Dr. Gage had never mentioned anything to him about writing a letter to Washington.

5. Dr. T. J. Kane was interviewed, paragraph 6 of the Cummins Affidavit was read to him, after which he stated to your affiant substantially as follows:

Dr. Kane stated that Dr. Gage had never made a statement as to an investigation of Tomson because of a pay-off. Dr. Kane advised that he recalled that Dr. Gage had stated that he had sent through a letter to Washington relative to a circular letter which was supposed to have been put out by the Veterans Administration, the contents of which letter or what it related to being unknown to Dr. Kane. He, Dr. Kane, also stated that as a result of Dr. Gage's sending the letter, he was "bawled out" by Dr. Long, and that prior to the bawling out, Dr. Gage had stated in effect: "I'm trying to get hold of a circular letter. I can't find out about it. Practically all circular letters are on file upstairs [66] except this one. I've written to Washington, I'll sure raise hell when I get it." Dr. Kane also stated that most of Dr. Gage's conversations were in regard to the circular letter and that he never mentioned Tomson aside from complaining about his work. He, Dr. Kane, stated that he did not know that it was common knowledge that Dr. Gage was making an investigation of a payoff by Tomson and he, Dr. Kane, further stated to affiant: "When you ask about Tomson by name, I say No; circular letter, Yes."

6. Your affiant interviewed Dr. M. J. Hurst, and read to him paragraph 7 and interrogated him generally with respect to the contents of the material reflected in para-

graph 6 of the Cummins Affidavit, after which Dr. Hurst stated to your affiant substantially as follows:

Referring specifically to paragraph No. 7, Dr. Hurst at first verified that Dr. Gage had made the statement; as to place and time, stating that it occurred in Dr. Gage's room at the Veterans Administration hospital about a month after he, Dr. Gage, came to the Veterans Administration. As to who was present, Dr. Hurst stated that Drs. Levine, Strachan, Kane and Kuhn were present when the statements were made, but later qualified this by stating that the statement was not necessarily made at one time but during the course of several conversations and that all of the above mentioned doctors were present at one time or another, but not necessarily together at the same time. In response to a question from your affiant as to what Dr. Gage had specifically stated, Dr. Hurst related that he had said that a lot of things going on did not seem right to him and that somebody was being paid for work which was not real first quality. Affiant asked Dr. Hurst if he knew that Dr. Gage had the authority to reject work and he stated that he had indicated that he, Dr. Gage, did not know he had such authority as shown by the fact that he did not reject it himself. Dr. Hurst also stated that Dr. Gage had said that he, Dr. Gage, had written a letter to Washington relative to a Veterans Administration circular he couldn't find in the file, but which he, Dr. Gage, knew had been put out. Dr. Hurst advised that the only thing Dr. Gage had said about Tomsone was that his work was inferior. He, Dr. Hurst, then stated in response to specific questions from your affiant that Dr. Gage did not specifically mention that he was investigating Tomsone; [67] that he, Dr. Gage, did not say he was trying to get Tomsone;



that he, Dr. Gage, did not say he suspected Tomsone was paying somebody off, but that his, Dr. Gage's conversation was general. After Dr. Hurst had made the last few mentioned statements above reflected, your affiant called attention that said answers were in conflict with those given at the initial part of the interview to which Dr. Hurst then stated substantially as follows: That he could not verify the material contained in paragraph No. 7 of the Cummins Affidavit, which was again shown to him, but went on to state that he, Dr. Hurst, did know that Dr. Gage had said that he was investigating something and a day or so later, he, Dr. Gage, had said that he had written a letter to Washington.

7. Paragraph 6 of the Cummins Affidavit was read to Dr. Kuhn by your affiant, after which Dr. Kuhn stated substantially as follows:

Dr. Kuhn advised that the attorney for Dr. Gage had called him on the telephone and asked him the question as just read to him from paragraph 6 relative to a payoff and that he had advised the attorney that he didn't want to discuss it over the telephone but would call back. Dr. Kuhn related that he was very busy and did not get a chance to call the attorney back, and that the attorney called him again and he, Dr. Kuhn, again refused to answer over the telephone and advised the attorney that he did not care to be involved in the case, upon which the attorney said that he would have to subpoena him. Dr. Kuhn advised your affiant that Dr. Gage had stated on several occasions that he was dissatisfied with things at the Veterans Administration but that other than that he said nothing. Dr. Kuhn stated further that Dr. Gage

never mentioned any investigation of a payoff by Tom-  
sone or graft or any sort of investigation in his presence.

8. Your affiant in conducting the investigation in connection with the material set forth in paragraph 9 of the Cummins Affidavit, called at the office of Dr. Long at the Veterans Administration and interviewed Miss Ellis, the Secretary-Clerk to Dr. Frank W. Long, Chief of the Out-Patient Department, making inquiry if their files reflected a letter generally described in paragraph 9 of the Cummins Affidavit. Said Miss Ellis made a search of the files and produced for your affiant a letter dated September 5, 1946 directed to one Mr. Bura, [68] apparently signed by one Theo. S. Gage, M.D. and made a copy of such original letter: attached to this Affidavit marked "Exhibit A" and by this reference made a part hereof is a copy of such letter so provided. That in addition thereto, the said Miss Ellis provided your affiant with a copy of letter dated September 25, 1946 apparently signed by C. M. Colebaugh, M.D., Chief Out-Patient Section directed to Manager, Veterans Administration, Regional Office, Los Angeles 25, California. Said Miss Ellis stated that said letter was apparently in reply to the letter referred to as "Exhibit A". A copy of said last mentioned letter is attached hereto marked "Exhibit B", and by this reference made a part hereof.

9. Your affiant interviewed Lt. Col. Strayder, Veterans Administration, and read to him that portion of material from defendant's Points and Authorities noted on page 7



designated as paragraph (3) to which Col. Strayder replied substantially as follows:

That he, Col. Strayder, did not pay any attention to what Dr. Gage had said because he was always grumbling about the quality of the shoes, but that he, Dr. Gage, had never made any statement that he, Dr. Gage, thought there was a payoff going on or that he was making an investigation of any kind. Col. Strayder stated that he rather questioned that Dr. Gage had made such a statement to him, since he was sure that if it had been impressed upon him that if any bribery or such matter was going on, that he would have reported it immediately to his, Strayder's, superior. He advised that when he talked to Mr. Cummins that he had meant that Dr. Gage had made so many statements that he had paid no attention and consequently did not know what he might have said. But that it was not his knowledge that Dr. Gage had made such a statement as set forth in said paragraph (3). Col. Strayder further related that he was contacted prior to Dr. Gage's trial by Dr. Gage and his attorney, and given a series of questions which he could not answer as he knew nothing about them. Col. Strayder stated that at that time, Dr. Gage had said that he, Dr. Gage, did not think he, Col. Strayder, would know as he was not there when it happened. Col. Strayder also related that it was not common knowledge to him that Dr. Gage [69] was making any kind of an investigation at the Veterans Administration.

Subscribed and sworn to before me this 17 day of  
January, 1947.

MARY M. DONETTI

Notary Public in and for the County of Los Angeles,  
State of California [70]

EXHIBIT "A"

COPY

VETERANS ADMINISTRATION

Los Angeles 25, Calif.

In reply refer to:

September 5th, 1946

Mr. Bura

Chief of Prosthetics

Dept. Medical & Surgical

Veterans Administration

Washington 25, D. C.

Dear Sir:

As Chief of the Out Patient Orthopedic Section at this facility some confusion has arisen to the validity of contractors form for furnishing veterans with prosthesis.

Many of these men have come in requesting the free choice of manufacturers. Under present set up here we are limiting to ten contractors only. It has come to my attention that on February 20th, 1946 you issued a letter to the effect that the veteran had free choice.

Is that still in effect and can you enlighten me as to the present set up. I would appreciate any circular letters pertaining to the subject.

Yours truly,

/s/ Theo. S. Gage, M.D.

Theo. S. Gage

Chief Out Patient Orthopedic Service [71]

EXHIBIT "B"

COPY

Branch Office 12

VETERANS ADMINISTRATION

180 New Montgomery Street

San Francisco 5, California

September 25, 1946

In reply refer to: SF10DD

Manager

Veterans Administration

Regional Office

Los Angeles 25, California

Dear Sir:

Your attention is invited to the inclosed letter dated September 5, 1946 from the Chief of the Out-Patient Orthopedic Service at your office in regard to the question of amputees' free choice of manufacturers which was sent by Dr. Gage directly to the Central Office.

The Acting Director Prosthetic Appliances Service has advised as follows:

"Please be informed that this office is contemplating a Veterans Administration circular clearly defining amputees' entitlement for artificial limbs as well as any free choice of such items. However, such a circular must receive concurrence from all interested Services as well as the approval of the Administrator of Veterans Affairs. Until these concurrences and approval have been obtained, the established procurement policy for artificial limbs must necessarily be binding for field stations. Possibly the authority contained in the All-Station Letter of May 22, 1945, subject: Prosthetic Appliances, will assist the field stations in furnishing beneficiaries with non-contract limbs without prior authority from this office. Otherwise it is suggested that the field station concerned request authority through channels for procurement of non-contract limbs requested by veterans."

For the Branch Medical Director:

/s/

C. W. COLEBAUGH, M.D.

Chief, Out-Patient Section

Incl 1

[Endorsed]: Filed Jan. 20, 1947. [72]

[Minutes: Friday, January 24, 1947]

Present: The Honorable Peirson M. Hall, District Judge.

This cause coming on for further hearing on motion of defendant, Theodore S. Gage, for a new trial; motion in arrest of judgment, and motion for judgment of acquittal, pursuant to motions filed December 30, 1946; and for hearing on report of the Probation Officer and sentence of the defendant on counts 1 and 2 of the Indictment; Norman W. Neukom, Esq., Asst. U. S. Attorney, appearing for the Government; Joseph J. Cummins, Esq., appearing for the defendant, and the said defendant being present in custody:

The Court discusses with Attorney Cummins the said motions, and Attorney Cummins argues in support thereof. On stipulation of counsel, and order of the Court, Exhibits A and B to the affidavit of Attorney Cummins, filed January 8, 1947, are ordered filed.

Attorney Neukom argues in opposition to the motions.

The Court makes a statement and orders each of the said motions for a new trial, in arrest of judgment and for acquittal denied.

At 11:10 A. M. court recesses and reconvenes at 11:15 A. M., all present as before; the defendant is present.

The Court pronounces judgment against the defendant as follows:

\* \* \* \* \* [73]

District Court of the United States  
Southern District of California, Central Division

No. 19,055

Criminal Indictment in two counts for violation of  
U. S. C., Title 18, Sec. 207

UNITED STATES

v.

THEODORE S. GAGE

JUDGMENT AND COMMITMENT

On this 24th day of January, 1947, came the United States Attorney, and the defendant Theodore S. Gage, appearing in proper person, and by counsel, Joseph J. Cummins, Esq., and,

The defendant having been convicted on verdict of guilty of the offenses charged in the Indictment in the above-entitled cause, to wit: (ct 1) that on or about Oct. 3, 1946 at West Los Angeles, Los Angeles County, California, defendant acting on behalf of the U. S. as orthopedic physician, U. S. Veterans' Administration Center, did ask for a bribe of \$100 from one Hubert Tomson with intent to have defendant's decision and action influenced thereby on matters of prescribing corrective footwear for patients at said center; (ct 2) that on or about Oct. 18, 1946, at said place, defendant in said capacity, did accept and receive a bribe of \$100 from said Tomson with intent to have decision influenced, etc., and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court



Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one year in an institution to be selected by the Attorney General or his authorized representative, and pay unto the United States of America a fine in the amount of \$1.00, on count 2; and for the period of one day in an institution to be selected by the Attorney General or his authorized representative, and pay unto the United States of America a fine in the amount of \$1.00, on count 1: imprisonment under said sentence on count 1 to begin and run concurrently with the first day of said sentence on count 2, so that the maximum time served shall be one year, and the maximum fine paid shall be \$2.00.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) PEIRSON M. HALL

United States District Judge

The Court recommends commitment to

A True Copy. Certified this ..... day of .....

(Signed) .....

Clerk

(By) .....

Deputy Clerk

[Endorsed]: Filed Jan. 24, 1947. [74]



[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that Theodore S. Gage, the defendant in the above entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this Court on January 24, 1947.

Dated January 28, 1947.

JOSEPH J. CUMMINS

Attorney for Defendant, Theodore S. Gage

Received copy of the within Notice of Appeal this 28 day of January, 1947. James M. Carter, U. S. Atty., by V. Bonhus, Attorney for Plaintiff.

[Endorsed]: Filed Jan. 28, 1947. [75]

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[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 83 inclusive, contain full, true and correct copies of Indictment; Minute Orders Entered December 2, 1946, December 10, 1946, December 11, 1946, December 12, 1946, December 13, 1946; Verdict; Motion in Arrest of Judgment; Motion for New Trial; Motion for Judgment of Acquittal; Affidavit of Joseph J. Cummins in Support of Motion for New Trial,

Motion in Arrest of Judgment and Motion for Acquittal and Exhibit "B" thereto; Affidavit of Howard H. Davis in Opposition to Motions Made by Defendant; Minute Order Entered January 24, 1947; Judgment and Commitment; Notice of Appeal; Designation of Contents of Record on Appeal; Order Extending Time to File Record on Appeal; Appellee's Designation of Additional Portion of Record on Appeal; Affidavit for Order for Transmission of Original Exhibits and Order for Transmission of Original Exhibit which, together with copy of Reporter's Transcript and Original Exhibits Nos. 1 to 9, inclusive, of Plaintiff, Defendant's Exhibit A and Exhibit A to the Affidavit of Joseph J. Cummins in Support of Motion for New Trial, etc., transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$21.95 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 20 day of March, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke  
Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Peirson M. Hall, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
ON TRIAL

Los Angeles, California

December 10, 1946

Appearances:

For the Plaintiff: James M. Carter, United States Attorney, Los Angeles 12, California; by Norman W. Neukom, Assistant United States Attorney.

For the Defendant: S. Ward Sullivan, Esq., 412 Chester Williams Building, Los Angeles, California.

Los Angeles, California, December 10, 1946; 2:00 o'clock P. M.

\* \* \* \* \*

The Court: Are we ready in the Gage matter?

Mr. Sullivan: Ready for the defendant, your Honor.

Mr. Neukom: Ready for the Government.

The Clerk: No. 19055, Criminal; United States v. Theodore S. Gage for trial.

Mr. Neukom: The Government is submitting its proposed instructions.

The Court: Very well.

The Clerk will fill the box.

(Whereupon a jury of 12 were duly impaneled and sworn.)

The Court: The remaining jurors are excused until notified.

Mr. Neukom, do you care to make an opening statement?

Opening Statement in Behalf of the Government

Mr. Neukom: May it please your Honor, counsel, ladies and gentlemen: At this time it is the privilege of the Government, or the one who represents the Government, to make an opening statement. In a case of this character, it is not my desire to make an extended statement. What I say at this time should not be interpreted as any evidence. You will accept only that evidence which is admitted from the witness stand, so if I make any allusions to facts and the evidence [4\*] does not prove those facts, do not accept my statement either for the Government or against the Government.

Now with respect to any legal aspect of this case, the same holds true, as counsel for the defense advised you. You must accept the law from the Court after all of the facts have been heard.

It is the position of the Government that the Government will prove that this defendant, Dr. Gage, violated a particular Federal statute as charged in two counts of this indictment which was read to you. The Government proposes to prove beyond a reasonable doubt that on or about October 3, 1946 the defendant while employed at the Veterans Facilities here at the place that we commonly refer to as Sawtelle, did solicit from one Hubert Tomsonsone, a man who had the orthopedic contract to provide shoes for outpatients, that is, veterans who were not living at the Facilities but who, for some reason or other, had peculiarities or trouble with their feet; that this man, Mr. Tomsonsone, operating as Hubert's Ortho-

\*Page number appearing at top of page of original Reporter's Transcript.

pedic Service, had the contract to provide shoes for this Facility and also for others.

We believe the evidence will prove that Dr. Gage was engaged as an orthopedic doctor for this Facility on or about August 2 of this year; that the contract with Mr. Tomsone between the Government and Mr. Tomsone was then in effect; that Mr. Tomsone, after a few weeks or sometime in September, was [5] approached by Dr. Gage and was told, in substance, that if he wished to carry on, that if he wished to profit by his contract, that he would have to make it right by Dr. Gage.

We believe the evidence will establish that over a period of time there were some negotiations along that line, and Mr. Tomsone didn't exactly go for that; that Mr. Tomsone reported that matter to the proper authorities, and that on October 15, 1946, Mr. Tomsone did pay to Dr. Gage a hundred dollars, after they had reached an agreement that he was to pay a hundred dollars a week if he was going to continue to get business, or if things were to be profitable to him with respect to his contract there at the Veterans Facilities.

I believe that the evidence will establish that the Federal Bureau of Investigation, through its agents, were advised of this incident, and Mr. Tomsone had the money, it was checked, it was handed to Dr. Gage, Dr. Gage accepted the money and within a very short period after that was taken under arrest and the money was found in his pocket.

In other words, the Government believes that it will establish beyond a reasonable doubt both the asking of and the actual receipt of the money in conjunction with the allegations as charged in this indictment.

The Court: Mr. Sullivan, do you desire to make an opening statement now or do you wish to reserve it?

Mr. Sullivan: I desire at this time to reserve my right [6] to make one.

The Court: Very well.

Call your witness.

Mr. Neukom: Call Mr. Mark.

ALVIN O. MARK,

called as a witness by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Alvin O. Mark; M-a-r-k.

The Clerk: Your address?

The Witness: 832 South Taylor; Montebello.

The Clerk: Take the stand.

Direct Examination

By Mr. Neukom:

Q. Mr. Mark, by whom are you employed?

A. The Los Angeles Regional Office of the Veterans Administration.

Q. Is that not located at what we commonly refer to as Sawtelle?      A. Yes, sir.

Q. You have been employed there for some time?

A. Since June of this year.

Q. In what capacity?

A. As the personnel officer.

Q. You were subpoenaed to produce the personal jacket [7] of the defendant Dr. Gage?      A. Yes.



(Testimony of Alvin O. Mark)

Q. Have you produced the order appointing Dr. Gage as a doctor or an employee for the Facility?

A. Yes, sir.

(Exhibiting documents to counsel.)

By Mr. Neukom:

Q. While they are examining that, may I inquire, are you acquainted with the defendant? A. Yes, sir.

Q. You knew, or did you observe, that he was working at the Facility here a few months back?

A. Yes, sir.

Q. To your best recollection, did he commence work around about August 2nd of this year?

A. On August 2nd.

Q. And continued to work until?

A. He was suspended on October 18.

Q. Of this year? A. Yes, sir.

The Court: What type of work was he doing?

The Witness: He was employed as an orthopedic surgeon.

By Mr. Neukom:

Q. I show you what appears to be an oath of office. Is this the document whereby Theodore S. Gage was placed to [8] work by the Veterans Administration?

A. Both documents, the oath of office and the personnel action.

Q. And the personnel action, as reflected from this carbon copy, is that correct? A. Yes, sir.

Mr. Neukom: May that be marked as one document, your Honor, the pink sheet and the oath of office?

The Court: Yes. No. 1 in evidence.



(Testimony of Alvin O. Mark)

(The documents referred to were received in evidence and marked Government's Exhibit No. 1.)

By Mr. Neukom:

Q. Has the defendant been paid as a paid employee?

A. Yes, sir.

Mr. Neukom: That is all.

The Court: Cross examine.

Mr. Sullivan: I have no questions.

The Court: You may be excused.

(Witness excused.)

Mr. Neukom: Call Mr. Howe, please.

GORDON L. HOWE,

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir.

The Witness: Gordon L. Howe; H-o-w-e. [9]

The Clerk: Your address?

The Witness: Quarters 290 at Sawtelle.

The Clerk: Take the stand.

Direct Examination

By Mr. Neukom:

Q. Mr. Howe, what is your business or occupation?

A. I am supply officer with the Regional Office of the Veterans Administration here in Los Angeles.

Q. And is that the same location where Dr. Gage was employed as a medical man from about August the 2nd of this year until around about October 18?

A. Yes, sir. And as you say, known as Sawtelle.

(Testimony of Gordon L. Howe)

Q. You are acquainted with the defendant here?

A. Yes, sir.

Q. Were you aware that he was performing services at the hospital where you were also employed?

A. Yes, sir.

Q. Were you personally aware, I mean?

A. Yes, sir.

Q. You were subpoenaed to produce a contract between the Facility, that is to say, the Government, the Veterans Administration, and Hubert's Orthopedic Service, were you not?      A. Yes, sir.

Q. I showed you what purported to be a copy, or a duplicate copy, of an application for a bid awhile ago, did I not?      A. Yes, sir. [10]

Q. And did you have occasion to compare that with the duplicate copy that is in the files that you have with you and which I understand are under your direction and supervision, are they not?      A. Yes, sir.

Q. To see whether or not the copy that I showed you was a duplicate copy of the one that reposes in the Veterans Administration files?      A. That is right.

Q. You made such a comparison?

A. Yes, I did.

Q. And you have before you the Government's copy?

A. Yes, I have the Government's copy, and they are substantially the same.

The Court: Substantially?

The Witness: Well, yes. The copy in Hubert's file doesn't bear the signature of the contracting official.

The Court: Have you got the original?

(Testimony of Gordon L. Howe)

Mr. Neukom: They are duplicate originals, your Honor. I intend to have one identified and then I am going to offer just that.

The Court: Let him see the original while he is looking at the copy. He may not consider the difference significant enough to mention. [11]

By Mr. Neukom:

Q. I show you a folder. Is this the folder of the files of the Veterans Administration under your control and custody? A. It is.

Q. And the document which is dated June 21, 1946, does that pertain to a contract awarded to the Hubert's Orthopedic service? A. It does.

Q. And is the signature down there of the contracting officer, G. L. Howe, is that your signature as the supply officer? A. Yes, sir.

Q. And was it your position and duty to handle the award of contracts as of that period? A. It was.

Q. And you have been in that capacity for about how long? A. Approximately eight months.

Q. I show you the document that appears under this. The remaining sheets, which comprise about 11 sheets, appear to be on mimeographed paper and they have at the top of them: "U. S. Standard Form 33 (revised)." To your knowledge were those invitations for bids, forms, that the Government put to people who might wish to submit a contract? A. That is right. [12]

(Testimony of Gordon L. Howe)

Q. And looking at the document, the 22 pages and the front page, will you relate to us in your specialized field there just to what date that contract was issued?

A. The invitation to bid was forwarded to interested parties June 5, 1946, bids were opened on June 21, 1946, and the contract awarded that same date?

Q. What date? A. On June 21, 1946.

Q. And the bid seems to bear the signature of one Hubert Tomsone. Are you acquainted with that man?

A. Yes, I am.

Q. Are you also acquainted with the Hubert's Orthopedic Service? A. As a contracting firm only.

Q. Of what character of work, if any, have they ever done for the Veterans Facility?

A. They performed work under this contract, and a previous contract also, furnishing specialized shoes in a specialized field, orthopedic braces, various types for the feet.

Q. For more than one hospital?

A. Yes, for more than one activity.

Q. But it was for more than just the Sawtelle unit then? A. That is right.

Q. And the others are specified in the contract, is [13] that correct? A. Yes, they are.

Q. This contract was to elapse as of what date?

A. June 30, 1947.

Q. Was the contract in force and affect during the month of October of this year? A. It was.

Q. Is it still in force and effect? A. It is.

Q. Has it ever been canceled? A. No, sir.

(Testimony of Gordon L. Howe)

Q. I show you a letter dated June 22, 1946, which bears the signature of one G. L. Howe. Is that your signature? A. Yes, sir.

Q. G. L. Howe, Regional Supply Officer?

A. Yes, sir.

Q. It refers to a contract number and is directed to Hubert's Orthopedic Service. Will you relate the circumstances or why you happened to write that letter?

A. Following the receipt of bids and the award of the contract, it is prescribed procedure to advise the successful bidder that he has been awarded the contract, and we do that in a form letter such as we mailed to Hubert's Orthopedic Service. [14]

Q. Now you are referring to the letter of June, 1946?

A. Yes, sir.

Mr. Neukom: Which I am now going to ask to be received into evidence as Government's exhibit next in order.

Mr. Sullivan: We have no objection to the letter.

The Court: Admitted.

The Clerk: Government's Exhibit No. 2.

(The document referred to was received in evidence and marked Government's Exhibit No. 2.)

Q. By Mr. Neukom: I note on the top of this file here that there appears to be a copy of Government's Exhibit No. 2. Is that the carbon copy of the letter for your file? A. Yes, it is our routine copy.

Q. I show you what appears to be a carbon copy of a letter dated June 19, 1946, on the letterhead of Hubert's Orthopedic Service. Is that letter a part of the file pertaining to this contract? A. It is.

(Testimony of Gordon L. Howe)

Q. And has been reposing in the file since shortly after the date of the letter?

A. Yes, since the award of the contract on June 21st.

Mr. Neukom: I am now going to offer this particular file, your Honor, with the contract, carbon copy of the letter, and other letter without any detaching, unless there is some objection. [15]

Mr. Sullivan: No objection.

The Court: Admitted. No. 3 in evidence.

(The file referred to was received in evidence and marked Government's Exhibit No. 3.)

By Mr. Neukom:

Q. Has Mr. Tomsone, or Hubert's Orthopedic Service, to your knowledge been paid for shoes or other devices that they have supplied to veterans who were outpatients and been paid by the Government pursuant to this contract? A. Yes, in the routine manner they have.

Q. Prior to this contract, do you know in connection with your work as a supply officer that Mr. Tomsone's concern was engaged and was being paid for devices and shoes and matters such as that? A. Yes, sir.

Q. Was that true during the month of October, 1946?

A. That is right.

Q. And is it still true? A. It is still true.

Mr. Neukom: That is all.

The Court: Cross examine.



(Testimony of Gordon L. Howe)

Cross Examination

By Mr. Sullivan:

Q. Mr. Howe, how long have you been employed as the supply officer at the Regional Office of the Veterans Adminis- [16] tration at Sawtelle?

A. I can't recall the exact date, but it was approximately September of last year, 1945.

Q. September of 1945?

A. When I was appointed; yes, sir.

Q. At the time you went to work there in September of 1945 there was already in existence a contract for the furnishing of orthopedic shoes and corrective shoes between the Veterans Administration and some person, was there not? A. Yes, sir.

Q. And the contract which was in existence at the time you went to work there expired sometime during the month of June of 1946? A. Yes, sir.

Q. And was it your duty as supply officer to forward to interested persons invitations to bid on a new contract for furnishing orthopedic shoes or corrective shoes to the Veterans Administration? A. It was.

Q. And as I understand your testimony on direct examination, there were invitations forwarded on June 5th to interested persons to furnish bids to the Veterans Administration for orthopedic shoes or corrective shoes for disabled veterans, is that correct?

A. That is right. [17]

Q. And were those invitations that were forwarded on June 5, 1946 forwarded under your supervision and direction? A. They were.



(Testimony of Gordon L. Howe)

Q. And were there any invitations forwarded to any persons other than to Mr. Hubert Tomsone?

A. There were.

Q. Do you know what other persons, to what other persons you did forward invitations to submit bids?

A. No, I couldn't recall them from memory.

Q. You have no independent recollection, as you sit on the witness stand here today, of the name or the names of any other persons to whom you forwarded invitations to submit bids?

A. No, sir.

Q. Now after this contract was executed between the Administration and Mr. Hubert Tomsone, as I understand your testimony, the contract went into effect on the 22nd day of June, 1946?

A. No, it was effective the first day of July, 1946.

Q. Effective the first day of July 1946 and ran until the 30th day of June 1947?

A. Yes, sir.

Q. In other words, it was a contract between the Veterans Administration and Mr. Hubert Tomsone to furnish to the Veterans Administration at Sawtelle and certain other hos- [18] pitals, Government Veterans hospitals, corrective shoes or orthopedic shoes for the period commencing with the first day of July 1946 and ending with the 30th day of June 1947, is that correct?

A. That is correct.

Q. And under this contract between the Veterans Administration and Mr. Hubert Tomsone, he was the only

(Testimony of Gordon L. Howe)

person who was authorized to furnish orthopedic shoes or corrective footwear to the Veterans Administration at Sawtelle and to the other veterans hospitals mentioned in the contract, is that not correct?

A. No, I wouldn't say that he was the only one, because that is too restrictive.

Q. Let me ask you this: Were there any contracts existing between the Veterans Administration and any other person or shoe manufacturing concern which had for its purpose the furnishing of orthopedic or corrective shoes to the Veterans Administration at Sawtelle for the period from the first day of July 1946 to the 30th day of June 1947 other than the contract that existed between the Veterans Administration and Mr. Hubert Tomsone?

A. There could be, but I have no knowledge of them.

Q. In other words, could there have been in existence such a contract that some other personnel administrator had supervision over that you had no supervision over? [19]

A. No, sir. I am the contracting officer for the Regional Office.

Q. All right. And if any such contract was executed it would have come under your jurisdiction out there, would it not?

A. A local award contract, yes. Our Washington office sometimes negotiates contracts for the entire Veterans Administration, and the various activities can take ad-

(Testimony of Gordon L. Howe)

vantage of those contracts as they see fit, but my memory doesn't permit me to say whether there is one or there isn't one.

Q. You have no independent recollection as you sit on the witness stand here today of any contract executed between the Washington office of the Veterans Administration and some person or shoe manufacturer which had for its object or purpose the furnishing of corrective shoes or orthopedic shoes to outpatients at the veterans' hospital at Sawtelle during the period from July 1, 1946 to June 30, 1947, do you? A. No.

The Court: Pardon me, Mr. Sullivan. How much longer will you be with this witness?

Mr. Sullivan: I might be a few minutes. If your Honor wants to adjourn maybe we had better have the recess.

The Court: We will recess until 10:00 o'clock tomorrow morning. You are admonished not to discuss this case among yourselves or with any other person or to form or express a [20] conclusion until it is finally submitted to you for decision.

Recess until 10:00 o'clock tomorrow morning. All witnesses are directed to return.

(Whereupon, at 4:35 o'clock p.m., a recess was taken until 10:00 o'clock a. m., December 11, 1946.) [21]

\* \* \* \* \*

Los Angeles, California, December 11, 1946, 10:00 o'clock a. m.

The Court: United States v. Gage.

Mr. Sullivan: Ready.

Mr. Neukom: Ready.

The Court: Is it stipulated that the defendant is present in person and by counsel, and that the jurors are present and each in his or her place?

Mr. Neukom: So stipulated.

Mr. Sullivan: Yes, your Honor.

The Court: Proceed.

GORDON L. HOWE,

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination (Continued)

By. Mr. Sullivan:

Q. Mr. Howe, I think at the time that we adjourned last night you had testified that you knew or did not know of the existence of any contract between the Veterans Administration made in Washington with any person to furnish orthopedic or corrective shoes to any of the patients at the Facilities at Sawtelle? A. Yes. [25]

Q. And I believe I asked you, and you testified that had such a contract been in existence, that it would have been under your supervision in so far as the Facilities at Sawtelle were concerned?

A. Yes, we would have had a copy of it.

(Testimony of Gordon L. Howe)

The Court: Did you over the recess look and see in the records if there was such a contract during that period?

The Witness: Yes.

The Court: Was there?

The Witness: I did not find any.

The Court: From the fact that you didn't find any in the usual course of business as it is run out there, you would say that this was the exclusive contract for the furnishing of shoes?

The Witness: Yes, sir.

The Court: Or whatever it furnishes?

The Witness: Yes.

By Mr. Sullivan:

Q. Now was there any procedure in effect at the Veterans Administration at Sawtelle for the furnishing of shoes, orthopedic or corrective shoes, to veterans from any person other than Hubert Tomsone?

A. I don't know of any.

Q. Isn't it true that from time to time you had various complaints from veterans that Mr. Tomsone could not make [26] their shoes, or made them incorrectly and that it was necessary to furnish a special order to have shoes made elsewhere?

A. No, I don't know of any. Let me change that. There could have been purchases made elsewhere outside of the contract.

Q. On an order from the Veterans Administration at Sawtelle?

A. Yes, the medical section.

Q. Did you have anything to do with the furnishing of any such orders?

A. No, sir.

(Testimony of Gordon L. Howe)

Q. You testified that you knew that Dr. Gage was employed at the Veterans Administration at Sawtelle?

A. Yes.

Q. And you did from time to time have occasion to discuss with him the matter of the shoes that were being made by Hubert Tomsonne under his contract with the Veterans Administration?

A. Yes, sir.

Q. As a matter of fact, Dr. Gage had from time to time complained to you about the manner in which Mr. Tomsonne was fulfilling his contract, didn't he?

Mr. Neukom: Just a moment, your Honor. I object to an extensive going into anything pertaining to this contract as being a collateral issue in this case. We are not trying the [27] contract. We are not here to determine whether or not this man was giving the best of service. There has been testified that there was a contract. It is in existence. It carries certain clauses in it. As to the other phases on that aspect of the case, they do not clarify any of the issues in this case.

The Court: Objection overruled. The introduction of the contract opens the door for cross examination concerning the practices under it and the things to which it relates.

Mr. Neukom: Very well.

Mr. Sullivan: Will you read the question, Mr. Reporter.

(The question referred to was read by the reporter, as follows:

("Q. As a matter of fact, Dr. Gage had from time to time complained to you about the manner in which Mr. Tomsonne was fulfilling his contract, didn't he?")



(Testimony of Gordon L. Howe)

The Witness: Yes. On two occasions I had telephone conversations with Dr. Gage about the services furnished under the contract.

By Mr. Sullivan:

Q. As a matter of fact, Dr. Gage told you on one of those telephone conversations that he had with you that the contract was not proper orthopedic contract, isn't that right? A. That is right. [28]

Q. And he suggested that it should be rewritten, and you suggested to him that since he was an othopedic man that he should rewrite the contract the way it should be written, in so far as orthopedic or corrective shoes were concerned? A. That is right.

Q. And he also called your attention to the fact that Mr. Tomsone was not making his shoes according to the specifications contained in the contract, didn't he?

A. I don't know just how to say it, but at times the contract didn't cover all the corrections that were required in the shoes that were made, and in those instances the corrective work was made on the nearest applicable clause or specification in the contract.

Q. Well, he called your attention to instances where an order had been given to a veteran to have a certain lift put in the shoe and that Tomsone was charging for an extension to the shoe, did he not? A. That is right.

Q. And he told you that when Tomsone was charging for an extension to the shoe he was charging the Government the sum of \$5 for the extension when a lift should only cost about a dollar or \$1.50, isn't that right?

A. Yes, that is about right.



(Testimony of Gordon L. Howe)

Q. Did you yourself ever receive any complaints from any veterans in so far as Tomsone's shoes were concerned? [29] A. No, sir.

Q. Any complaints that came to you about it would come from the doctors in the orthopedic department?

A. Yes.

Q. Is that right? A. Yes.

Q. Do you recall ever having issued a special order to a veteran by the name of Curry to have orthopedic shoes made by some person other than Tomsone?

A. No, I don't.

Q. Do you recall ever having issued a special order for orthopedic shoes to be made for a veteran by the name of Kandlish to some person other than Tomsone?

A. No, I don't.

Q. Now Dr. Gage did inquire from you from time to time as to whether or not he had a right to issue an order to a veteran to have shoes made by some person other than Hubert Tomsone, did he not?

A. I don't remember.

Q. You do remember having had some discussion with Dr. Gage in relation to the execution of this contract with Tomsone? A. Yes.

Q. And you told Dr. Gage that Mr. Tomsone was the only person who submitted any bid? [30]

A. For a complete service under the intended contract.

Q. Did you have other bids submitted?

A. One other bid.

Q. Who was that from?

A. I don't recall the name of the concern.

Q. You haven't made any effort to check your records since yesterday to ascertain that, have you?

(Testimony of Gordon L. Howe)

Mr. Neukom: He has it there.

The Witness: I have it here.

Mr. Neukom: Check it now.

The Witness: (Examining file) To the Hollywood Orthopedic laboratory.

The Court: By the way, counsel asked you a moment ago if you remembered giving a special order for shoes to two parties. Would that be in there?

A. No, that wouldn't be in the file.

By Mr. Sullivan:

Q. Do your records there disclose the names of the persons who were invited to submit bids on the contract which is now in effect? A. Yes.

Q. What does your record show as to the names of persons who were invited to submit bids?

A. The Hillcrest Orthopedic Appliance Company, which is in San Diego, Krueger Surgical Company in Los Angeles, [31] Green Orthopedic Appliance Company, Los Angeles, George R. E. Milligan Company, Los Angeles, Hubert's Orthopedic Service, Los Angeles, Michael's Foot Comfort Shop, Santa Monica, Hollywood Orthopedic Laboratory.

The Court: And you had only two bids?

The Witness: Two bids.

By Mr. Sullivan:

Q. Are you acquainted with a shoe manufacturer, orthopedic shoe manufacturer, by the name of Sears?

A. I know of him.

Q. Do you recall having had some conversation with Mrs. Sears about this contract? A. Yes.

(Testimony of Gordon L. Howe)

Q. Do you recall that she made some inquiry as to why they had received no invitation to bid?

A. That is right.

Q. Do your records at the Administration in Sawtelle disclose that at some time in the past Sears did have the contract for the making of orthopedic corrective shoes?

A. The records in our office are relatively new, that is, within the last year, since the date of the organization of the office, so our records do not go back beyond about September of last year.

Q. Then you had no record, as far as you were concerned, about Sears ever having had a contract? [32]

A. No, sir.

Q. These other people that invitations were submitted to bid, do your records disclose that they at some time in the past had had some contracts?

A. I might explain, at the time we prepared this invitation we contacted the supply office at the hospital which had heretofore handled these contracts for the list of names which they ordinarily used in submitting bids, and this list of names was what we secured from them.

Mr. Neukom: Possibly it might be informative, your Honor, for him to explain that there is a divergency between one phase of this Facility and this new outpatient Facility, of which he is now the regional supply officer, if counsel would like to have it explained.

I understand there are units out there, many units, and that this is a new unit that has been set out as distinguished from the old hospital itself which has been there for years, which formerly used to handle that.

Mr. Sullivan: We might have that explanation so that we will understand the procedure out there.

(Testimony of Gordon L. Howe)

The Court: Go ahead.

The Witness: The Regional Office, which now controls this contract, prior to about the middle of last year was a part of the home and hospital activities at Sawtelle, an integral part. Then the work of the Regional Office's activi- [33] ties expanded to such an extent that it was necessary to break away from the hospital and set the regional office up as an independent activity.

The Court: For outpatients?

The Witness: For outpatient service; yes.

The Court: And that is what your office is?

The Witness: Yes, sir. In connection with only the veterans outside of the hospital.

The Court: So that while you are part of the Veterans Administration there you have nothing to do with the hospital or the patients in it, only outpatients?

The Witness: That is right, just outpatient service. And when our office organized, we started in with just a bare office and we had to build our records up as we went along, and had to rely on information we could get from the office at the hospital, so that even now we go back to them in many instances to get information about certain activities that we have no record of, and this was just the customary procedure where we had no knowledge of what firms might be interested in bidding, we just asked them for their mailing list and used that in the preparation of our bids.

Mr. Sullivan: I think that is all I have of this witness, your Honor.

The Court: Redirect?

Mr. Neukom: Yes, your Honor. [34]

(Testimony of Gordon L. Howe)

I probably will refer to this in time. I am going to give you the one that is in evidence because I have a copy of it.

(Exhibiting document to counsel.)

### Redirect Examination

By Mr. Neukom:

Q. Mr. Howe, did you have knowledge from the main hospital activity that Mr. Tomsone had had a previous contract with the hospital? A. Yes.

Q. Did you have any knowledge that any such contracts had ever been canceled?

A. Not to my knowledge.

Q. As to any complaints that had been made about any particular shoes that Mr. Tomsone's firm had made, had Mr. Tomsone shown a willingness to rectify any such errors or mistakes or lacking in workmanship?

A. As far as I know, he was given an opportunity to make any corrections necessary, and as far as our office records are concerned, why the corrections were satisfactorily made.

The Court: What do you mean by corrections, repayment of overcharges?

The Witness: No. I might explain, sir. It is a customary procedure in contracts such as this, where the appliance [35] has to be fitted to the individual's measurements, that adjustments have to be made after it is manufactured, and sometimes an appliance will be furnished and it doesn't fit at all, so it is referred back to the contractor.

(Testimony of Gordon L. Howe)

The Court: I understand. In other words, you mean the mechanical correction of the contrivance?

The Witness: That is right.

By Mr. Neukom:

Q. Now with regard to this contract, did you also cause to be posted prior to the acceptance of Mr. Tomsone's bid notices that the Government was inviting bids at any post offices?

A. Yes. We sent the bids to three different post offices.

Q. What are they?

A. To the main office in Los Angeles, to the Santa Monica post office and the Beverly Hills post office.

Q. Prior to the acceptance of this contract with Mr. Tomsone, did you personally have any personal contact with him other than in business? A. None at all.

Q. Did you have any social contract with him?

A. No, I didn't.

Q. Did you have any discussions with him?

A. No. I just knew that Mr. Tomsone had this contract. [36] I knew him by sight. That is about the extent of our relationship.

Q. Now did you yourself, were you the final person in deciding whether or not this contract should be let to Mr. Tomsone?

A. There is a rather involved procedure there. At the time the bids are opened the bids are recorded and then a committee of three pass on the award of the contract according to the conditions and specifications and clauses. Then following this indication of award by the committee the entire bid folder containing all the bids goes to the finance office of the Regional Office and there it is



(Testimony of Gordon L. Howe)

audited again by representatives under the direction of the finance officer, and if everything is in order it is returned to the supply office for proper distribution.

Q. Then is it passed upon by a board of three?

A. No, the board passes before it goes to the finance office for audit.

Q. But it is not left to your final decision?

A. No.

Q. Were the forms that were submitted and which were from your files, Government's Exhibit No. 3, were the forms that comprise this file standard forms that were sent to your offices from your Washington office?

A. Yes. This is the prescribed form of invitation of [37] this sort.

Q. I observe that it appears to be mimeographed, is that correct?

A. That is the usual procedure.

Q. And this is made available to anyone who wishes to bid upon the contract?

A. That is right.

Q. With all of its pages they fill in what portions of it they care to bid upon, is that correct?

A. That is correct.

Mr. Neukom: I would like to read from portions of this contract.

Reading from page 2 of Government's Exhibit 3—and I have a copy of it so counsel may follow along with me—at the top of page 2 appears:

"The right is reserved to the contracting officer to declare the contractor in default if, in the opinion of the contracting officer, there has been at any time a failure to perform faithfully any of the contract stipulations, or in case of willful attempt to impose upon the Government



(Testimony of Gordon L. Howe)

articles and/or services inferior to those required by the contract, and any action taken by the contracting officer, in pursuance of this stipulation, shall not affect or impair any right [38] or claim of the United States to damages for breach of any of the covenants of the contract by the contractor. It is understood and agreed that when a contractor has been declared in default by the contracting officer thereafter during the remainder of the contract period the Veterans Administration may purchase the articles and/or services covered by the contract of the defaulting contractor without furnishing said defaulting contractor orders thereafter, and that any excess in cost over the original contract price shall be charged to said defaulting contractor and his sureties, if any."

Q. If I may inquire, was a bond posted for faithful performance of this contract?

A. I am not sure. I don't believe a bond was required in this instance. It would show in the contract.

Mr. Neukom: I will have to leave that for another witness then if you are not acquainted with that phase of it.

Reading from the same page:

#### "SPECIAL CONDITIONS

"1. Prices quoted in this proposal will not be in excess of those charged the general public.

"2. Bidder certifies that the prices quoted in this bid are not in excess of any applicable price ceiling established by the Office of Price Administration.

"3. Notice to bidders: Prices bid should include [39] any applicable Federal Excise Taxes, as the United States is not exempt from payment of such taxes.

(Testimony of Gordon L. Howe)

"4. This proposal, if accepted, shall become a contract and shall remain in force during the period above stated unless terminated at the request of either party after thirty (30) days notice in writing.

"5. In the event the Veterans Administration closing either of the Activities concerned, subsequent to the execution of the contract or during the contractual period the contract in so far as that activity is concerned, may be canceled immediately upon written notice to the contractor and the Veterans Administration relieved of its obligation to make further purchases of supplies and/or services thereunder.

"6. If within sixty (60) days after delivery, an article furnished under this proposal is found to be unsatisfactory due to imperfect fit or faulty construction, upon being returned to the contractor, it will be corrected, and adjusted or replaced if necessary, to give satisfactory results.

"7. The facility reserves the right to reject all items which are faulty in construction, or in which the materials are of unsatisfactory quality.

"8. No item will be approved for payment until it has been inspected by an authorized representative of the facility. Acceptance will be governed by the quality of materials, character of workmanship and accuracy of fittings. Before final rejection is made, reasonable opportunity will be given contractor to make the required corrections of faults and adjustments."

The remainder of it is with regard to specifications and with regard to individual items as to what the price will be for the service, and to read it to you, you would not

(Testimony of Gordon L. Howe)

remember it and I would prefer to later have it passed around to [40] you.

That is all from this witness.

The Court: Recross?

Recross Examination

By Mr. Sullivan:

Q. You recall, do you not, that in one of the conversations you had with Dr. Gage that he told you that Mr. Tomsone was using an inferior grade of leather in the shoes which he was making which was in violation of the terms of this contract, did you not?

A. I don't remember that point.

The Court: Would you say that you never had the conversation or you just don't recall it?

The Witness: I don't recall it, sir.

By Mr. Sullivan:

Q. Do you have any record under your control or supervision that would indicate the approximate number of shoes that were ordered of Mr. Tomsone per month under this contract which is now in existence with Mr. Tomsone? A. Yes. Our files would show that.

Q. Do you recall the approximate number of shoes? This contract went into effect July 1, 1946.

A. Yes.

Q. And between the months of July, that is, from July 1st, in September 1st, July and August of 1946, do you recall [41] approximately how many shoes were ordered under this contract?

A. No, I wouldn't remember that.

Q. You couldn't even tell us approximately?

A. No, I wouldn't even hazard a guess.

(Testimony of Gordon L. Howe)

Q. Do you know approximately how many shoes were ordered under this contract per month during the months of September and October of 1946?

A. No, I don't.

Mr. Sullivan: I think that is all, your Honor.

Redirect Examination

By Mr. Neukom:

Q. Mr. Howe, if the defense would like it you would be willing to try to furnish that information, would you not?

A. Yes, we can get that out of our files.

Mr. Neukom: I happen to have it. It will come from another witness in summation form.

Mr. Sullivan: That may be satisfactory.

Mr. Neukom: I might show this to you sometime and maybe you will be willing to consider this that I have here.

Mr. Sullivan: All right, Mr. Neukom:

By Mr. Neukom:

Q. But, Mr. Howe, will you try to secure that information and if it becomes material we will call you?

A. That is separating July and August and then September and October? [42]

Mr. Sullivan: Yes.

The Witness: Yes, we will prepare that for you.

The Court: Total appliances or articles furnished?

The Witness: Yes.

The Court: Or just shoes?

The Witness: Should I go on and give a total recapitulation of the items and money?

Mr. Sullivan: I think we are primarily interested in the shoes.

(Testimony of Gordon L. Howe)

Mr. Neukom: May I have a moment with counsel?

(Conference between counsel.)

Mr. Neukom: Break it down as to the regional office and as to the center, the total amount of material that Mr. Tomisone furnished both to the regional office and the center, break those items down and then give the totals for July, August, September and October.

The Court: Otherwise the witness may be excused and may return on telephone call if it is necessary?

Mr. Neukom: Yes.

(Witness excused.)

The Court: Next witness.

Mr. Neukom: Dr. Long.

DR. FRANK L. LONG,

called as a witness by and in behalf of the Government, having been first duly sworn, was examined and testified as [43] follows:

The Clerk: Your name, sir?

The Witness: Frank L. Long.

The Clerk: Your address, Dr. Long?

The Witness: Veterans Administration, Sawtelle.

Direct Examination

By Mr. Neukom:

Q. Dr. Long, what is your occupation?

A. I am a physician.

Q. Licensed to practice here in the state of California?

A. I am.

(Testimony of Dr. Frank L. Long)

Q. You are connected with what organization?

A. With the Veterans Administration.

Q. And have been so connected for how long, approximately?

A. Twenty-seven years next month.

Q. And at the present time what is your title or duty?

A. I am Chief Medical Officer of the Medical Department and Chief of the Outpatient Department at the Sawtelle Hospital.

Q. That is the same unit or breakdown of which Mr. Howe is the regional supply officer?

A. Yes.

Q. Prior to that were you affiliated and connected with the hospital or Veterans Administration Hospital at Sawtelle? [44]

A. With the outpatient department.

Q. And have been for a number of years?

A. I have been in this office all the time I have been with the Veterans Administration. It will be 27 years next month.

Q. Are you acquainted with the defendant Dr. Gage?

A. I am.

Q. When did you first meet him?

A. When he reported for duty on August 2nd of 1946 was the first time I ever saw him.

Q. Did he work under your direction?

A. He did.

Q. And as working under your direction, what phase of duties did he have?

A. He had to do with the examination and treatment of eligible veterans with orthopedic disabilities and supplying and determining the need of shoes or modified shoes and also of artificial limbs.



(Testimony of Dr. Frank L. Long)

Q. Was it a part of his duties to recommend to superiors or to other phases of the hospital as to whether or not shoes or orthopedic devices should or shouldn't be accorded deserving veterans?

A. He had the responsibility of determining under the regulations whether the veteran was entitled or needed—not entitled but what kind of an appliance he needed. Whether he [45] was entitled to treatment was determined by somebody else, his eligibility, I mean.

Q. Let us assume a man was a veteran who was eligible and needed some correction to his foot that might be aided by some corrective shoe. Was it a part of Dr. Gage's duties to examine such a patient's or veteran's feet?

A. It was.

Q. And then was it a part of his duties to recommend whether or not the Government or the Veterans Administration should purchase shoes or devices for that patient?

A. Yes. He would recommend what was needed under the contract and write his order in the treatment folder, and that was taken to the orthopedic clerk and she would write up the purchase order and send it to the supply department to be obtained.

Q. Was his judgment during the period that he was working there, was he given more or less free reign to recommend? A. He was responsible for that.

Q. And if he would recommend shoes in the normal course of events, would shoes be bought by the Government, orthopedic shoes? A. Yes.

Q. And paid for? A. Yes. [46]

Q. And if he would state that shoes were not justified or were not needed, they would not be provided, is that correct? A. That is right.



(Testimony of Dr. Frank L. Long)

Q. Did he have other doctors working in conjunction with him?

A. Yes, there was another doctor, a Dr. Nie, who was not an orthopedic surgeon but who knew the regulations as to entitlements and can write repeat orders and such as that.

Then he asked to have some assistance soon after he came there, and I assigned Lt. Strachan to him, a young doctor, for his help. He said that he needed somebody else, so there were two other doctors helping him.

Q. Was he so engaged up to the 18th of October of this year?      A. Yes.

Q. And his work was somewhat of the character that you have generally described during the interval from August 2 to about October 18?

A. Yes, that was his responsibility.

Q. Dr. Long, are you acquainted with Mr. Tomisone?

A. Yes.

Q. Since you have been with the Facilities for over 26 years, did you know whether or not Mr. Tomisone has had contracts with the Veterans Administration to provide orthopedic [47] devices and particular shoe devices?

A. He has. Up until two and a half years ago I had no administration authority at all. At that time I was appointed the Assistant Chief of the Outpatient Service. Prior to that time I don't know the exact arrangement that they had, but I remember seeing him around there for several years and knew that he was in the orthopedic business.

Q. Doctor, during the time that you have been in charge of this regional office of the outpatient department,

(Testimony of Dr. Frank L. Long)

has Mr. Tomsone, with the exception of minor misadjustments, has his devices to your knowledge appeared to be satisfactory?

A. Generally so. We have had some complaints and some that he had to make over, and there have been in times past, especially during the war when things were hard to get, there were more complaints than there have been of late.

Q. Did he show a willingness to cooperate?

A. To my knowledge he always tried to make it good and if he couldn't then he would have to do something else about it.

Q. That is to say, there might be extreme cases where his offices or his shop was not capable of furnishing?

A. The individual sometimes enters into it. It is pretty hard to fit or satisfy everybody. Once in a while it is almost impossible. A fellow gets an idea, maybe it is not an idea, that he can't fit it, and we have bought three pair [48] of shoes to try to fit the veteran's needs, and when a veteran needs a shoe we have to try to get it some place.

Q. Do you have, Doctor, some figures as to the amount of devices of anything that Mr. Tomsone has done?

A. I asked my orthopedic clerk to give me the numbers, and I have them on a memorandum in my pocket.

Mr. Sullivan: I have no objection to him referring to them.

Mr. Neukom: Let us both look at them. I have not seen it myself.

(Counsel examining document.)

(Testimony of Dr. Frank L. Long)

The Witness: This is just what the clerk handed me for the four months in the outpatient department for the regional office, and this list is for what was furnished for the domiciliary and hospital people.

Mr. Neukom: May we examine the doctor right here on this, your Honor, so we can both be here?

The Court: Surely.

By Mr. Neukom:

Q. Will you explain what the first page is?

A. This is the number of shoes that were furnished the outpatient department for the months of July, August, September, October and November.

Q. By Mr. Tomsone?

A. That was the orders we issued to him. Some of them [49] may not be completed yet. I don't know about that. But that is that is the number of orders that were issued to him.

Mr. Neukom: May we offer this with the exception that I don't think—I have no objection. The month of November appears here. Do you wish to have it remain on?

Mr. Sullivan: I have no objection to it remaining on there.

Mr. Neukom: May this be offered as Government's exhibit next in order?

The Court: No. 4 in evidence.

(The orders referred to were received in evidence and marked Government's Exhibit No. 4.)

The Court: That is a summary taken by you from the record?

The Witness: That is right, of the orders we issued.

(Testimony of Dr. Frank L. Long)

The Court: For shoes?

The Witness: For shoes and arch supports and repairs under the contract that he had.

The Court: It is indicated "arch supports," "shoes" and modifying shoes is that what you mean by repairs?

The Witness: That is right. Modifying his own shoes to fit the condition.

The Court: All right.

By Mr. Neukom:

Q. I show you the next document which has a heading [50] "purchases made from Hubert's Orthopedic Service beginning July 1, 1946, home and hospital patients." Is that different than Government's Exhibit 4?

A. This is in addition to that because this is the ones at the hospital and home which the regional office does not pay for, but the contract covers the furnishing of these things to the three units, the regional office, the soldier's home or domiciliary department, or the main hospital if they have anybody in there that requires any of these items.

Q. But Uncle Sam pays for it all?

A. That is right.

The Court: They were all purchased under that one contract?

The Witness: That is right.

Mr. Neukom: I will offer this as Government's exhibit next in order.

Mr. Sullivan: We have no objection.

The Court: Exhibit No. 5.

(Testimony of Dr. Frank L. Long)

(The document referred to was received in evidence and marked Government's Exhibit No. 5.)

The Court: You say the "home and hospital" is the Soldier's Home?

The Witness: That is the Soldier's Home, the domiciliary department. You might be eligible for shoes in the home when you might not be eligible on an outpatient basis. In [51] the outpatient department you have to have service-connected disability and meet the requirements for special appliances.

By Mr. Neukom:

Q. Without going into the conversation, Dr. Long, I just want to ask you one question: Did Mr. Tomson sometime, either in the latter part of September or early in October of this year, come to you and discuss with you a matter that he wanted to call to your attention with regard to conversations he had had with Dr. Gage?

A. He did.

Mr. Neukom: That is all.

The Court: Cross examine.

#### Cross Examination

By Mr. Sullivan:

Q. Dr. Long, as I understand your testimony, you were the Chief Medical Officer connected with the Regional Office at the Veterans Administration in Sawtelle?

A. And Chief of the Outpatient Service pending the complete separation of the two units.

(Testimony of Dr. Frank L. Long)

Q. And as such Chief Medical Officer, you were the superior of Dr. Gage, were you not?

A. That is right.

Q. And as such Chief Medical Officer your duties were not confined entirely to the orthopedic unit at the hospital, were they? [52]

A. That is right. There are many other duties I had besides that.

Q. In other words, you had supervision over all of the various units of the outpatient department, is that right? A. That is right.

Q. And the first time that you ever became acquainted with Dr. Gage was on the 2nd of August 1946?

A. That is right.

Q. And he came there to accept a position as the chief orthopedic surgeon? A. He did not.

Q. Was that merely the position that you assigned him to?

A. He assumed the position as chief. He was not chief of the service. There was no such thing as chief of the orthopedic service. He was a doctor assigned to that work.

Q. He was the doctor assigned as the orthopedic physician? A. That is right.

Q. Is that correct?

A. That is right. But not chief of the unit.

Q. Did you assign him as the orthopedic physician and surgeon?

A. Yes. I told him what his duties would be and where he was to work when he reported. [53]



(Testimony of Dr. Frank L. Long)

Q. When you assigned him to the orthopedic department you had made some inquiry prior to that time to ascertain his qualifications to fill that position?

A. I never heard of him until he showed up there for the duty. The branch office, or somebody else, had processed him and appointed him. I had no knowledge of him coming other than the spring before—I take that back—Dr. Caldwell, my predecessor, had had contact with him and he had his name as wanting a job, but I didn't see him at that time to my knowledge. But he did have his name on the list there as a prospective doctor for the orthopedic service.

Q. As Chief Medical Officer of the Regional Office, was it your duty to assign the various doctors who were employed there to the particular duties which they were to perform?

A. That is right.

Q. And in making an assignment of the doctors to the various units or duties which they were to perform, did you make any inquiry to determine if they had any special qualifications?

A. He was assigned there as the orthopedic doctor. I had nothing further to do with it as to his qualifications.

Q. Was he assigned as the orthopedic doctor by you?

A. Yes, when he reported there I told him where he was to work and what he was to do.

The Court: Who decided whether or not he was going to [54] do orthopedic work?

The Witness: I did.

The Court: He was assigned there then just as a doctor?



(Testimony of Dr. Frank L. Long)

The Witness: He was assigned as a doctor, as an orthopedist, but we wanted to use him there. But if I had wanted to use him somewhere else I could have used him. If I had not been satisfied with his work I could have transferred him. But he did come there as the orthopedic doctor.

The Court: Who decided that, that he was going to go there as the orthopedic doctor? Was it whoever hired him or did you?

The Witness: He was assigned there as the orthopedist.

The Court: I still don't know who made that decision that he was to be there as an orthopedist. You asked for an orthopedist, did you?

The Witness: That is right.

The Court: And they sent you him?

The Witness: That is right. He was assigned there.

The Court: By somebody else?

The Witness: By the branch office in San Francisco, the personnel department.

The Court: All right.

By Mr. Sullivan:

Q. When he came there then, if you had wanted to assign him some place else you could have done so? [55]

A. I could have done; yes.

Q. Before making the assignment to the orthopedic department, did you make any inquiry as to his qualifications?

A. No. I made no inquiries because we had a vacancy in the orthopedic service, we needed a doctor to look after

(Testimony of Dr. Frank L. Long)

that work, he was assigned there as an orthopedist, with orthopedic qualifications, and he was assigned to that work.

Q. Then you did have some information that was furnished to you before that time that he was an orthopedic doctor, is that right?

A. Yes. He was considered as such when he arrived there.

Q. And you got that information from the records which were furnished you, is that not right?

A. Yes, and what he said that he was, an orthopedic surgeon.

Q. Then you had some discussion with him about his qualifications?

A. Not qualifications. He was assigned there as a doctor and we were to use him, and there was a vacancy in the orthopedic service, and that is where we wanted to use him.

Q. Don't you make any inquiry of these doctors when they come there to work to ascertain if they specialize in one particular branch of medicine and surgery or another?

A. I would if I interviewed him, but I never interviewed him. Frequently a doctor applies for a position out there and I talk to him to find out what his qualifications are and what he has been doing or wants to do and recommend to the personnel department that they employ him. But I never discussed with Dr. Gage his qualifications prior to him coming there.

Q. I understand that you didn't, but I say, when the doctor comes, any doctor comes, to work in the outpatient department there, of which you are the chief medical officer, as I understand your testimony you can assign that

(Testimony of Dr. Frank L. Long)

doctor any place you want, or to any particular kind of work you want to assign him to?       A. I could.

Q. What I am trying to ascertain is this, that when you make the assignment of a doctor to some particular type of work, medicine or surgery, do you yourself make any inquiry to ascertain where he is best fitted to serve the veteran?

A. I understood that he was an orthopedic surgeon and he was being sent down there as the orthopedist. We had a vacancy there and he was assigned to that job.

Mr. Sullivan: I move to strike the answer as not responsive.

Mr. Neukom: I think the answer is.

The Witness: He told me he was an orthopedic surgeon and I assigned him to that job. [57]

The Court: It is and it is not responsive. We will strike it. I can see what counsel is trying to get at. I think maybe you do too, Doctor.

The Witness: I am not trying to evade it.

The Court: The long and short of it is that he was hired by somebody else and sent to you and they said, "Here he is," is that right?

The Witness: That is right.

The Court: "Here is your orthopedist"?

The Witness: That is right. We needed one and we put him in that department.

The Court: You said, "Are you Dr. Gage, the orthopedist?" and that was all there was to it? You didn't go down and ask him where he went to school or anything else?

The Witness: No. That was determined by others.

The Court: I see.

(Testimony of Dr. Frank L. Long)

By Mr. Sullivan:

Q. You don't make it a practice of making any inquiry of the individual doctor after he comes there to determine where he is best fitted to serve?

A. I told you a while ago that if he applied there first to me for a position, then I would ask him, but there have been doctors assigned by the branch office personnel department to the division and I have nothing to say, that they can't work there. [58]

Q. But you do have something to say about what particular type of work he does?

A. Yes. If he was just a general practitioner, I wouldn't put him to do mental and nervous disease examinations, or if he is better fitted for some specialty I would like to see that he has that work to do.

Q. That is what I was trying to determine, whether or not you yourself, as the chief medical officer, tried to determine or made any efforts to determine his qualifications by an interview with the doctor himself.

A. No, I knew he was assigned there as an orthopedist, that he had been there and consulted Dr. Caldwell, who was the former chief, in the spring, and we had his name that he was an orthopedist, and then when he reported for duty with the authority from the personnel department it was designated on there that he was an orthopedic surgeon, so I naturally put him in the orthopedic department.

The Court: Had you made a request for an orthopedist?

The Witness: Oh, yes; we had.

(Testimony of Dr. Frank L. Long)

By Mr. Sullivan:

Q. When you say that he was assigned as the orthopedic doctor, was he at that time the only doctor assigned to handle the orthopedic cases there?

A. He was not.

Q. There were other doctors there? [59]

A. That is right.

Q. That were doing that same work?

A. Well, not an orthopedic surgeon. A doctor was filling in and, as I say, he was doing a good many of the things that had to be done in that department. Then when the doctor was there a while he asked to have somebody else assigned to him, and I assigned a young fellow, Lt. Strachan, to help him out for whatever help he needed. He was to use his discretion, whatever he wanted to use him for.

Q. And also Dr. Nie?

A. Dr. Nie has been in the Veterans Administration quite a long time and he had been helping the former orthopedic doctor, especially as to re-ordering and ordering things under the specifications. He was not an orthopedic surgeon.

Q. Well, then, after Dr. Gage came to work there and he was assigned to the orthopedic department, as I understand your testimony it was his duty, when a patient came to the hospital, that is, a veteran came to the hospital for the services of the Veterans Administration, and if he was a veteran who was in need of some orthopedic appliance of some sort or other, he was sent to the department to which Dr. Gage was assigned?

A. That is right.



(Testimony of Dr. Frank L. Long)

Q. And it was Dr. Gage's duty to determine medically [60] whether or not the veteran was in need of some kind of an appliance or not?

A. Yes, he or Dr. Nie, either one could do that.

Q. Either one of them? A. That is right.

Q. In other words, Dr. Nie had just as much right to determine that question as Dr. Gage did?

A. That is right.

Q. And if they determined that the veteran was in need of some kind of an appliance, then the question to determine whether the veteran was eligible to be furnished with that appliance at the expense of the Government was left to someone else?

A. That was determined before he got there. A man's eligibility to benefits is determined before he gets down to this clinic to be furnished. He determines what type of thing he needs if he needs it.

Q. When the veteran reported there for examination, there was a folder that contained a record of his case, is that not right?

A. That is right, an outpatient treatment folder where he wrote his findings and recommendations in.

Q. Yes. And when a veteran called there or came there for an examination, if it was determined that he was in need of some kind of an appliance, there was a record of that put [61] in that particular veteran's folder?

A. That is right.

Q. Is that not correct?

A. Yes. He wrote the order there and signed his name to it and sent it to the clerk to write the purchase order.



(Testimony of Dr. Frank L. Long)

Q. Now in any event, if the doctors in the orthopedic department determined that the veteran was not in need of some kind of an appliance, was there a statement to that effect put in the veteran's folder?

A. If they disagreed—they have a board of two doctors, and if they couldn't agree they were to come to the assistant chief of the outpatient department or me. On one occasion a patient, a veteran who had been authorized to receive treatment by the California Physician's Service, this doctor had received authority to treat him and he had recommended that this man have a brace, back brace, and he came out there to get the measurements, and for some reason or other—I don't know how—he got into Dr. Gage's office. He had no business there for Dr. Gage to pass on. Dr. Gage turned him down. As a matter of policy, this authority had been given to the private doctor who had recommended this, and he came out there for a measurement of the brace, and the question of one doctor saying he didn't need it and the other doctor had approved it, he had been given authority for it, so I said to go ahead and purchase it for him irrespective of [62] what Dr. Gage said because it wasn't his business to determine that at all in that particular case.

Q. You are speaking of that particular case?

A. That is the only one I can remember.

Q. You did say that if they disagreed then it was left to the decision of two doctors?

A. If they couldn't agree, if there was any question that the two doctors should not agree on, then we would have the assistant chief of the outpatient department be the third member.

(Testimony of Dr. Frank L. Long)

Q. In any event, if one doctor examined the patient and determined that he was not in need of some kind of an appliance, was it then the custom to call in another doctor to consult with him?

A. It wouldn't have been unless the man had been receiving something for a period of time and he was going to be cut off from a usual order or treatment. He should have had consultation to do that.

Q. In other words, if it was a veteran who had been furnished in the past with a particular kind of appliance and he came there to have a new one made or some correction made on what he had, if the doctor determined that he didn't need it, then it was the custom to call in another doctor to have the opinion of two rather than one?

A. Yes, provided the thing has been running along for [63] some time.

Q. But if the veteran was new in the outpatient department there and the doctor who examined him determined that he did not need the appliance, then was it under those circumstances the custom to call in another doctor to confirm his opinion?

A. No. Ordinarily we would take his opinion unless the veteran complained that he wasn't satisfied, and then we would have another doctor look at him. We would give the veteran the benefit of the doubt and try to satisfy him if possible.

Q. Now, then, where the doctor did determine that the veteran was not in need of any mechanical appliance of any kind, a report to go with the doctor's opinion and reason therefor was put in the veteran's folder, is that not correct?

A. Should be.

(Testimony of Dr. Frank L. Long)

Q. And of course you as the chief medical officer has supervision over all of the records of the veterans and the outpatient department?

A. That is true, but I wouldn't see all these reports because that was left to these doctors to do unless they got into some disagreement or something why I probably wouldn't see them.

Q. But if there was a complaint from the veteran, then the veteran had a right to come to you, did he not?

A. That is right. [64]

Q. And under those circumstances you would get out the veteran's folder and determine what the doctor's opinion was, is that not right?

A. I would have to finally decide what was to be done about it.

Q. Was it your custom then to call in the doctor who had given this opinion and discuss the matter with him?

A. It would be, but he never came to me at any time about any individual.

The Court: Who?

The Witness: Dr. Gage. He came to me and said that he thought that there should be another contractor so that the man could have a choice of more than one contract. I told him it probably would be better, but we were only given one contract to operate on and that is all we had to do. He never complained to me of any individual.

By Mr. Sullivan:

Q. What I was driving at was this: If the veteran came to you and complained that he was not furnished with an appliance which he felt he was entitled to, you then got the veteran's folder and found that the doctor who had examined him had, in his opinion, determined it

(Testimony of Dr. Frank L. Long)

was unnecessary for him to have such an appliance, and was it then your custom to call in the doctor who had made the examination and discuss that veteran's case with him? [65]

A. If I had any complaint from the patient I would, certainly.

Q. Now during the time that Dr. Gage was employed there, that is, I believe from the 2nd of August 1946 to the 18th of October 1946, did you have any complaints from any of the veterans as to his decision?

A. One.

Q. Just one? A. That is right.

The Court: That is the one you mentioned a while ago?

The Witness: That veteran did not complain to me. Only one in person came to me. He said he had been denied a pair of shoes and he had been getting them.

By Mr. Sullivan:

Q. Was he an outpatient?

A. He was an outpatient.

Q. Do you remember what his name was?

A. He was from up around Oxnard. I don't know whether his name was Valentino or not.

Q. Valentine was it?

A. Valentine I believe it is.

Q. When Mr. Valentine came and complained to you, did you call in Dr. Gage and discuss it with him?

A. I did not at that time because this investigation was going on and I had nothing to do with it. I didn't say [66] yes or no what to do about it because I had turned this complaint over to the investigating department out there and I had never been told it was settled and I didn't bother. I could say later though he was furnished his

(Testimony of Dr. Frank L. Long)

shoes. But at that time he came and told me that the doctor said he thought he could modify his own shoes.

Q. That Dr. Gage had informed him that in his opinion they could modify the shoes that he had?

A. Yes, but he apparently changed his mind and sent for him to come back and his shoes were issued to him.

Q. You did, after Dr. Gage was employed there, have some discussion with him in relation to the contract which existed between the Veterans Administration and Mr. Tomsone?

A. He thought that there should be two, that the veteran should have the choice of more than one contractor, and I said that that probably would be all right but they have only given us one contract and that is all we can work with.

Q. He told you, didn't he, that the reason he felt that there should be some other contractor to make shoes was that he was getting a lot of complaints from the veterans to whom orders had been given to have shoes furnished by Mr. Tomsone that the shoes were not made right?

A. He never complained to me about any particular individual or group of individuals not being satisfied, to my knowledge. I know over a course of time there have been a [67] few, even before he came there, that we would have difficulty in satisfying. I don't recall him ever speaking to me specifically about any individual case. His chief complaint was that we only had one contractor, that the man ought to be permitted to go to more than one place.

Q. Didn't he complain to you that Mr. Tomsone was not making his shoes according to the specifications contained in the contract which he had?

A. He never made such a statement to me.



(Testimony of Dr. Frank L. Long)

Q. You never heard such a complaint from Dr. Gage at all?

A. Not as to that. He spoke, as I told you before, that we ought to have a second contractor.

Q. Did he tell you why they ought to have a contract with some other person?

A. That the man ought to have a choice to go to be better satisfied.

Q. Did you ask him why he felt the man should have a choice?

A. No, I didn't. I told him we couldn't go to anybody else, that they had only given us one contract to work with.

Q. Now since this contract that went into effect on July 1, 1946 with Mr. Tomsone, have you had any complaints from the veterans in relation to the manner in which Tomsone [68] was making their shoes?

A. We have three now that have not been settled, that they are complaining about not being fitted. It is the only three that I can recall. There are several others probably that maybe I don't know about, which haven't been brought to my attention. But I know of three. They have occasionally occurred over the life of the previous contracts to my knowledge because it has been difficult to fit everybody and, generally speaking, except during the wartime we did have more complaints then about leather and the like, but his answer was that things were hard to get, and I guess they were. I don't know.

Q. In other words, since the war is over you haven't had, so far as you know, any complaints about the quality of the leather?

A. Not quality. Occasionally as to the fit, as to the proper fitting of the shoes.



(Testimony of Dr. Frank L. Long)

Q. Have you had any complaints about Mr. Tomsone failing to put in a metal brace in the shoe when the specifications called for it?

A. Not to me. It wasn't brought to my attention.

Q. You have your copies of these documents which have been admitted in evidence here as Government's Exhibits 4 and 5? A. Yes. [69]

Q. Would you kindly refer to Government's Exhibit 4?

A. I don't have the copy for the one for the regional office. I do have it for the hospital and home.

Q. You do not have this one?

A. No, I do not have that one.

Q. Well, referring here to Government's Exhibit 4, take the month of July, at the top you have the month and then "No." appears, is that not true? A. Yes.

Q. Does that mean the number?

A. That is the number of shoes.

The Court: How much longer are you going to be with this witness?

Mr. Sullivan: I probably won't be more than a few minutes. We should take a morning recess, I suppose.

The Court: We will take it now. Short recess. Remember the admonition.

(Short recess.) [70]

The Court: The usual stipulation?

Mr. Neukom: Yes, your Honor.

Mr. Sullivan: Yes, your Honor.

The Court: You may proceed.

Q. By Mr. Sullivan: Doctor, referring to Government's Exhibit 4, that is a summarization of the number of arch supports, modified shoes and new shoes that were

(Testimony of Dr. Frank L. Long)

ordered during the months of July, August, September, October and November through the outpatient department.

A. That is right.

Q. And those orders all refer to the veterans who were considered as outpatients by the administration?

A. Well, some of those might have been in the hospital and been in the soldiers' home department. They were the ones that were to be furnished these things through this contract through the outpatient department.

Q. Well, isn't No. 5—

A. Oh, pardon me. This is the outpatient and this is the hospital home. You are right about that.

Q. So, so far as Government's Exhibit No. 4 is concerned it relates only to arch supports, modified shoes or new shoes that were ordered for patients who were considered as outpatients? A. That is right.

Q. And so far as Government's Exhibit No. 5 is concerned [71] it relates to the number of new shoes, arch supports and modified shoes that were ordered for patients who were inmates of the—

A. The soldier's home.

Q. The soldier's home? A. Yes, sir.

Q. Doctor, as far as you are concerned you have no ill feeling toward Dr. Gage, have you?

A. None whatsoever. I have had no complaints as to medical qualifications at all from a medical standpoint.

Q. And you are here solely because you are subpoenaed here as a witness by the Government?

A. That is right.

Q. Is that not right? A. That is right.

Q. And you are on a salary at the Veterans Administration, are you not? A. That is right.

(Testimony of Dr. Frank L. Long)

Q. And you expect to be paid your salary even though you are spending part of your time here in court, do you not?      A. That is right.

Q. Now, do you know a doctor out there by the name of Dr. Levine?      A. Yes, sir.

Q. Dr. Koon?      A. Yes. [72]

Q. Dr. Kane?      A. Yes.

Q. You are aware of the fact that they have been subpoenaed as witnesses on behalf of the defendant in this matter, Dr. Gage, are you not?

A. I heard he was out there and subpoenaed these doctors. They never told me they were but I have been told that they were subpoenaed.

Q. You had some discussion with them about being subpoenaed here as a witness, didn't you?

A. No. I mentioned to Dr. Levine—asked him was he subpoenaed but not the other two and I was wanting to know because I would have to cover their work if they were gone. That was the object of it as I remember it.

Q. Well, you informed those doctors, did you not, that they appeared in court in response to a subpoena served to testify as a witness on behalf of Dr. Gage and that they would not be paid for their time that they were away from the administration?

A. No, I never discussed that point with them at all.

Q. Never made such statement to either Dr. Levine, Dr. Kane or Dr. Koon?      A. I did not.

Mr. Sullivan: I think that is all, your Honor.

The Court: Any redirect examination? [73]

Mr. Neukom: Just one question, your Honor.

(Testimony of Dr. Frank L. Long)

Redirect Examination

By Mr. Neukom:

Q. You assigned Dr. Gage to the orthopedic service which you testified you understood that he was especially qualified for, during the months of August or September. Did he ever complain to you with regard to that assignment?

A. Just a few days before—

Q. I am asking about August or September.

A. Not through August or September.

Mr. Neukom: That is all.

Mr. Sullivan: I have no further questions.

Mr. Neukom: Dr. Long, I would like to ask you this question: What were the names of the doctors—is it Dr. Levine?

Mr. Sullivan: Yes, Dr. Kuhn and Dr. Kane.

Mr. Neukom: Will you please when you return to the Facility direct both of those doctors to appear here in court?

The Witness: Me direct them?

Mr. Neukom: You have the authority.

The Witness: They are subpoenaed. They would have to come anyway. I cannot control that.

Mr. Neukom: Well, you suggest to them that they honor the subpoena and appear in court.

The Witness: They will have to do that. They have [74] enough judgment to respond to a subpoena.

Mr. Neukom: That is all.

The Court: The witness may step down. Call your next witness.

Mr. Neukom: Mr. Tomsone.

HUBERT TOMSONE,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Hubert Tomsone.

Direct Examination

By Mr. Neukom:

Q. Your address, Mr. Tomsone?

A. 426 South Hillview.

Q. Los Angeles? A. Yes, sir.

Q. You will have to talk a little louder, please.

A. All right.

Q. Try to talk to the jury—so the jury may hear you.

A. All right.

Q. You have a business here in Los Angeles known as the Hubert Orthopedic Service? A. Yes, sir.

Q. And you have been in the orthopedic work for about how long, Mr. Tomsone? [75]

A. Oh, since 1928.

Q. Just tell us generally what the orthopedic work is that you have trained yourself for or have become experienced in.

A. All right. I started in this business when I was an orphan. My parents died when I was eight years old. I was raised in a home in Europe.

Q. Unfortunately we do not want to go into your entire life background. I want you to tell us about the work itself, the orthopedic work.

A. Well, the orthopedic work consisting, according to doctors' specifications where if a person has a short leg or he has a deformity of a foot or anything of that sort,

(Testimony of Hubert Tomsone)

that they are limping, this work is consisting of making cork extensions. Is made out of plaster Paris to raise them, to balance equal so that their spine will be equally balanced.

First of all, in this kind of work what we do is the job that when a doctor gives us a prescription to do a certain kind of work we have to follow them just as they prescribe. I am not a doctor. I just take orders as a doctor tells me to do. Some of the cases those shoes has to be built with metatarsal pads where those boys have cal-louses or overweight to carry their weight on the arch instead of the ball of their foot. So in this particular contract of the Government's there was about 51 different items and this 51 [76] different items, consisting of a special shoe first order and repeat orders. The first order is an order where the doctor prescribes the first time. Repeat orders is when the person gets the second pair of shoes which was prescribed the first time.

Then there is also a kind of work on the shoes—if a shoe has to be made by plaster cast or by wooden lasts, and those also go as a repeat, as first and second orders. Then there are another type of work, an orthopedic shoe, where orthopedic shoes could be a standard orthopedic shoe and also a specially made orthopedic shoe prescribed.

The job that I do for the Government is a job that where a shoe is prescribed, specially made orthopedic shoes by measurements and when we make those shoes we generally give the patient one or two try-ons before we finish the shoes to find out if a person has a callous or if he has bunions or if he has shortening in his leg.

First, we get the shoes—first we get the leather and—no, first, we take the measurement of the person's foot.



(Testimony of Hubert Tomsone)

Second we cast him. Third we go ahead after we cast the foot and we take a plaster of Paris and we take the bandage off.

The Court: Do you consider all this material?

Mr. Neukom: Well, I don't.

The Witness: It comes to the point, your Honor—

The Court: Just a moment. [77]

Q. By Mr. Neukom: I do not care to go further. Are you a craftsman in that particular line? I mean by that, you have made shoes and these devices that you have been talking about? A. Yes, sir.

Q. You have done the actual work yourself?

A. That is right, and my man who works for me.

Q. And you have a contract, a present contract which is Government's Exhibit 3, here with the original office in the Veterans Administration, do you not?

A. Yes, sir.

Q. And in connection with your contract did you put up a bond for faithful performance? A. Well—

Q. Just say yes or no. A. Yes, sir.

Q. And in what amount? A. For \$1,000.

Q. And was that a surety bond?

A. Yes, from the Aetna Company.

Q. Before this contract which started here last summer, did you have other contracts with the hospital or the Veterans Administration in Sawtelle?

A. Yes, I have been having contracts with Sawtelle Hospital, Birmingham Hospital, Long Beach, San Diego and San [78] Fernando. In other words, I have 27 Government hospitals under contract which takes care from San Diego to Santa Barbara.

(Testimony of Hubert Tomsone)

Q. And do you call at the Veterans Administration since this new contract is in effect? A. Yes.

Q. About how many times a week—the one out here in Sawtelle?

A. In Sawtelle? Every Tuesday and Friday at two o'clock.

Q. And do you go out there and if the doctor directs you to take casts and other things of the feet of the veterans do you do so? A. That is right.

Q. And after that you follow the prescriptions that the doctor gives you in an attempt to make the shoe or the device according to the prescription, is that correct?

A. Yes, sir.

Q. And then carry on like you have generally informed us, is that correct? A. Yes.

Q. Do you make any shoes or any devices for any veterans without first obtaining the prescription or the approval of the doctor?

A. I do not make any shoes unless I have a prescription by the doctors. [79]

Q. Are you acquainted with the defendant in this case, Dr. Gage? A. The first time I knew him—

Q. Just say yes or no. A. Yes, sir.

Q. And when did you first meet him?

A. I met him after I came back from my vacation, the second day of September. That is the day after Labor Day.

Q. And where was that? A. Sawtelle Hospital.

Q. Was that in the Regional Office?

A. At the outpatient.

Q. And after you met Dr. Gage did you have occasion to fill any orders or start working on any orders or ortho-

(Testimony of Hubert Tomisone)

pedic devices or shoes that were prescribed by Dr. Gage?

A. Yes, sir.

Q. And did you make more than one of such devices or shoes?

A. Yes, sir.

Q. In connection with your work with the Facility and the Veterans Administration, have you received complaints from time to time about your work?

A. Well, I received some kind of complaint by the veterans and I told the veterans—

Q. You have answered the question. You have received [80] complaints?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And you have received more than one complaint, have you not?

A. That is right.

Q. Have you in each instance endeavored to correct it?

A. Yes.

Q. The complaint?

A. Yes, sir. Always made maybe new shoes or correct the one I had already done without charge.

Q. Now, after you had met Dr. Gage at the Facility—I understand the first time you met him was shortly after your return from your vacation?

A. That is right.

Q. Early in September?

A. That is right.

Q. Did you ever have occasion to have a conversation with Dr. Gage with respect to how your business was?

A. Yes, sir.

Q. And when was that to the best of your knowledge?

A. Well, this was on Tuesday, the following day after Labor Day that I came back to work at Sawtelle, after my vacation. [81]

Q. And where did that take place?

A. The following Friday he asked me how is business.

(Testimony of Hubert Tomson)

Q. Where did that take place?

A. Inside of the Veterans Hospital in his office.

Q. Dr. Gage's office? A. Yes, sir.

Q. Who was present, if anyone, besides you and Dr. Gage? A. Well, there was himself and I.

Q. And that was the Friday after the Tuesday that you had come back from your vacation?

A. Yes, sir.

Q. In the early part of the September of this year?

A. That is right.

Q. Will you relate what Dr. Gage said to you and what you said to him in that conversation?

A. All right. He asked me, he says, "How is business?" I says, "Business is good." And he says to me, "Well, I don't think so," and I says, "Why?" and he says to me, "Well, I know there has to be a lot of change around here in this Facility because there has been a lot of veterans who have been getting shoes from the Government which is not entitled to them. Now, you tell me that business is good. And I know from my prescriptions I have cancelled quite a few orders on contract—" Just a minute, how do you say it? "Because you [82] thought that these boys might be entitled to shoes." And I say, "I don't think in my thinking that those boys are entitled to shoes." I said, "That is your business."

And from one word to another he says to me, "When you address me you call me Dr. Gage," and I said, "For your information when you address me," I said, "you call me Mr. Hubert." I say, "Feeling in that matter is not against one another." I say, "You are here as a doctor to prescribe and I am here as a contractor to fulfill what you subscribe me to do."

(Testimony of Hubert Tomsone)

He walked away. I walked away. The following time that I go back to Sawtelle—

Q. Now, was that the end of that conversation?

A. That is right.

Q. You go to the hospital on Tuesdays and Fridays, is that correct?

A. Yes, sir.

Q. And this occurred on Friday to the best of your recollection?

A. That is right.

Q. Now, the next time that you went back to the hospital what day was that?

A. It was on Tuesday.

Q. The following Tuesday, is that correct?

A. That is correct. [83]

Q. Did you then have a conversation with Dr. Gage?

A. Yes.

Q. And where did it take place?

A. In the hallway.

Q. In the hallway? Where is the hall?

A. In the front of his office in the outpatient.

Q. What was said?

A. He said to me, "Hubert," he says, "I am sorry that I talked to you like that last Friday but I like you. I want to talk to you about something very important."

And I said, "What is it all about?"

He said to me, "You know, I have been rejected by the Board of the Medical Association here in Los Angeles twice." He says, "Furthermore," he says, "I am only making \$6,000 a year and after all, I am not here for my health. I got to make money somehow."

And I said to him, I said, "This is one part that I don't want to have nothing to do."

So he says to me, "Well, you think it over and I will see you later."



(Testimony of Hubert Tomson)

So, I walked out from his office down through the hall and I was kind of nervous. I didn't know what to do. So as I walked down through the hall I saw Dr. Van Franklin. He stopped me and he said—

Q. Now, wait a minute. We won't go into what you said [84] to Dr. Van Franklin. The conversation you had with Dr. Gage is what we are interested in at this time. Do you recall whether that was all that he said?

A. That is all he said that day.

Q. Then you walked down the hall and you met a Dr. Van Franklin?

A. Van Franklin.

Q. And you talked with him?

A. Well—

Q. Just say yes or no.

A. Yes.

Q. Then did you see Dr. Gage again that day?

A. Yes, for a prescription which he already had issued for some orders for the boys who came out to Sawtelle for this kind of work.

Q. You saw him again that day, is that correct?

A. Yes, sir.

Q. And did he talk to you about any matters that he had talked to you earlier about that day?

A. He says to me that he would like to talk to me about this proposition that he was not out there for his health. He said he had to make some money somehow because he had to have money to pay off some of those persons who might help him to get a license for the State of California.

Q. Did he say anything to you about orders for you? [85]

A. He said if I would play ball with him that he could make me have a lot more business than what I had now



(Testimony of Hubert Tomsone)

because he knew that the orders I have been getting at the present when he was there wasn't enough for me to take care of my contract, but I told him that I had enough work to take care of veterans and also my own customers for a long time, so if it slacked up a little bit I didn't mind. That is the reason why I went on my vacation.

Q. Well, during that conversation was there any conversation about him seeing you again at the hospital or any place?

A. The following—I don't recall if it was on Tuesday or Friday, but I saw Dr. Gage again at his office to get prescriptions and he says to me, "Hubert, you are selfish. There are a lot of people who make money on the outside and also a lot of physicians who get so much money as a monthly—as a monthly present sent him from other doctors, and I told him that I didn't want anything to do with it. He says to me, "Here is my address. I want you to come over."

Q. May I interrupt now? Pardon me. I show you what has been marked for identification Government's Exhibit No. 6, the little sheet of paper, and I ask you if you have ever seen that before? A. Yes.

Q. Who handed that to you? [86]

A. Dr. Gage.

Q. When he handed it to you did he have a conversation or tell you anything?

A. He told me to go down to his apartment and talk to him about this matter for us to make money on the side so that he would be in Sawtelle to prescribe shoes and he wanted me to give up my contract so that he could re-open a new bid under an assumed name as a professional

(Testimony of Hubert Tomsone)

shoe service instead of orthopedic service, and he told me he would like to have me as a silent partner. I would be doing all the work in the shop and he will prescribe all the work on the inside so that we could make a lot of money.

Q. Did he say anything, though, about what this writing on this was when he handed it to you? Did he hand it to you?

A. He handed it to me in his office in his own handwriting.

Q. What did he say it represented?

A. He told me to come down to see him to his apartment to discuss this money proposition that he wanted to make on the side, and for me to cancel my contract.

Q. I mean, did he tell you what this was? Can you read this?

A. Yes. This is the William Tell Apartments, 250 South Santa Monica Boulevard, Santa Monica. [87]

Q. Did Dr. Gage tell you that was his home?

Mr. Neukom: I would like to offer this in evidence.

The Court: Received.

(The document referred to was marked as Government's Exhibit No. 6, and was received in evidence.)

Q. By Mr. Neukom: Now, did you ever go to Dr. Gage's home as indicated on Government's 6?

A. No, I didn't.

Q. Your answer is that you did not? A. No.

Q. Did you call him up on the telephone?

A. I called him up the following day at the Veterans Administration.

(Testimony of Hubert Tomson)

Q. Now, had you reported this matter to Dr. Long up to this time?

A. Yes, I have reported to Dr. Long from the first day when the conversation started that he wanted money from me.

Mr. Sullivan: Just a moment. We will object to any conversation had with Dr. Long.

The Court: The objection is sustained and the jury is instructed to disregard the last statement of the witness, that he wanted money from him.

Q. By Mr. Neukom: Did you report the matter to Dr. Duncan?

A. Yes, sir; I have reported to Mr. Duncan. [88]

Q. Now, you say you called him up on the telephone the following day after the last conversation that you related and was that where—where did you talk to him? Where were you?

A. I was at my shop.

Q. And you called the Veterans Hospital or the Regional Office?

A. The Veterans Administration, Outpatient.

Q. Did you ask for Dr. Gage?

A. Yes, sir.

Q. And did you talk to Dr. Gage?

A. Yes, sir.

Q. Did the voice sound like the voice of Dr. Gage?

A. Yes, sir.

Q. Do you remember just what you said and what he said?

A. I told him that I could not meet him at his home, which I didn't want to.

Q. Well, it isn't what you didn't want to do. You told him that you could not meet him?

A. I told him that I could not meet him at his home and in the meantime—

(Testimony of Hubert Tomson)

Q. Wait a minute. Is that all you told him?

A. Yes.

Q. Or did you have any other conversation with him?

A. Well, I told him that I could not meet him at his [89] home. Then he says to me, "Why don't you come out here today and meet me at noon," and I asked him where. I said "Where would you want to meet me? At the front entrance of the hospital?"

He said, "No, meet me at Wilshire and Sawtelle Boulevard."

So, before that, as I said, I reported to Mr. Duncan.

Q. Wait a minute.

The Court: Is that all the conversation?

The Witness: No. So I get in my car—

Q. By Mr. Neukom: Did he tell you what time to meet him?

A. About twelve o'clock I get in my car. I get on Wilshire Boulevard and I got to Sawtelle. It was about quarter to twelve, and I was sitting in my car waiting at Sawtelle Boulevard and Wilshire, so I was sitting there waiting a few minutes; and a few minutes later, must have been about 12:10 or 12:15, Dr. Gage comes up to my car and I said to him, "What did you want me to do?"

He said, "Well," he said, "I am hungry."

I said, "Well, I guess it would be a good thing for us to go for dinner."

I drove toward Westwood. He says to me, "There is no good place in Westwood to eat." He said, "Turn around [90] here on Wilshire. We will go down to the Mayfair Restaurant at Wilshire Boulevard and Santa Monica."

(Testimony of Hubert Tomisone)

Q. May I interrupt here? A. Yes.

Q. Had you advised Mr. Duncan, the Assistant Manager of the Veterans Outpatient, that you were going to meet Dr. Gage?

A. Yes, sir. I called him right after I talked to Dr. Gage.

Q. All right. Now, you turned around and you headed toward Santa Monica?

A. Yes, Santa Monica, that is right.

Q. And where did you go?

A. At the Mayfair Restaurant.

Q. In Santa Monica? A. Santa Monica.

Q. And you went in there and ate dinner?

A. We walked in, yes.

Q. With Dr. Gage? A. Yes. We walked in.

Q. The answer is yes? A. Yes, sir.

Q. During the dinner did you have any further discussion with regard to this proposition or these matters that you have previously testified to? [91]

A. Yes, sir.

Q. And who was present? I mean right at your table. Was anyone else present besides you and Dr. Gage?

A. When I got up I was introduced to Mrs. Gage when she came in and recognized him at the table and he introduced me to this Mrs. Gage, and we shook hands, and as I looked at Mrs. Gage I turned around and I saw Mr. Duncan, who was there.

Q. But at your table as you ate your dinner who was present? A. Just Dr. Gage and I.

Q. Where was Mrs. Gage?

A. She came in as we was getting up to leave. We already were through dinner.

(Testimony of Hubert Tomsone)

Q. Now, before Mrs. Gage got there did you and the doctor have any other conversation about what you have previously testified to? A. Yes, sir.

The Court: We will take a recess until two o'clock.

(Whereupon, at 12:00 o'clock noon a recess was had until 2:00 o'clock p.m. of the same day.) [92]

Los Angeles, California, December 11, 1946, 2:00 o'clock p.m.

The Court: Any ex parte matters?

The Clerk: No, your Honor.

The Court: United States v. Gage. Are you ready?

Mr. Sullivan: Yes, your Honor.

Mr. Neukom: Yes.

The Court: Usual stipulation?

Mr. Sullivan: Yes, your Honor.

Mr. Neukom: Yes, your Honor.

The Court: There was a witness on the stand.

Mr. Neukom: Mr. Tomsone, will you resume the stand?

### HUBERT TOMSONE,

the witness on the stand at the time of recess, having been previously duly sworn, resumed the stand and testified further as follows:

#### Direct Examination (Continued)

By Mr. Neukom:

Q. At lunch time, Mr. Tomsone, we were at lunch in Santa Monica. You were having lunch in a place with Dr. Gage. Now will you please relate to the jury—first,



(Testimony of Hubert Tomisone)

was this about the 3rd of October or the early part of October of this year?     A. Yes, sir.

Q. While you were at lunch, will you relate to the jury [93] the substance of the conversation between you and Dr. Gage?

A. Well, we were having lunch together, that is as I said before, and his wife come in and I was introduced to her as his wife, and I told her, "Pleased to know you."

The Court: That was after you finished lunch. You told us about that. Now what he wants to know is what you said to Dr. Gage and what Dr. Gage said to you.

The Witness: Dr. Gage told me that he would like to have out of this contract a hundred dollars, and I told him, I said, "A hundred dollars a month?"

He said, "Hell, no, \$100 a week."

I say, "Gosh, I don't want to get into this."

He said, "Well, I can show you that there are many doctors who get complimentary each month as eye doctors or any other physician so that the appreciation has been given to them for the customers that they send you through the time."

And I told him, I said, "I don't know. I sure don't like to get into any mess like that because I don't want any part of it."

He said, "You are not getting into any mess like that. You see, I know what is going on in Washington." And he says to me that for him he was going to resign on the 15th day of the month, and in the meantime he thought if I would pay him the \$100 a week that he might not resign.

So as we drove back— [94]

Mr. Neukom: Just a moment.

(Testimony of Hubert Tomsone)

Q. Was there anything said during that conversation about more shoe orders?

A. Yes. As we were driving back he said to me, "From now on you will see the difference in orders in shoes, starting today."

This conversation was taken on Thursday.

Q. Just a moment. Let me interrupt you. Did you at any time, either in the cafe or as you were driving back, tell him that you would pay him the \$100?

A. I would tell him that I would pay him the \$100 but I could not make up my mind whether I would or not.

So he said, "Well, you take your time. In the meantime we are going to issue a lot of shoes starting today."

When I took Dr. Gage back to the Veterans Administration I drove up to see Mr. Duncan, and I told Mr. Duncan—

Mr. Sullivan: Just a moment. I am going to object to any conversation had with Mr. Duncan.

The Court: Only conversations you have had with the defendant Dr. Gage are admissible.

The Witness: I see.

By Mr. Neukom:

Q. Did you see Mr. Duncan when you went back to the hospital? A. Yes, sir. [95]

Q. And you had a talk with him? A. Yes, sir.

Q. Now did you have another talk with Dr. Gage a few days later?

A. That was the following day, Friday.

Q. Where did that take place?

A. Inside his room.

Q. You mean his office? A. His office.

(Testimony of Hubert Tomsone)

Q. Who was present?

A. Well, Dr. Gage and I.

Q. Do you recall what was said during that conversation?

A. He told me that he would wait for me to give him the \$100, and I told him that I couldn't afford to pay him, and he said, "Well, I have to make more money because I just come back from downtown and they refused me to give me my license to practice in the State of California."

I told him that if he needed the money I was advised to pay him by check. So I throw my checkbook on top of the table.

Q. Speak up.

A. I put my checkbook on top of his table there, on his desk, and I told him, "Here, write yourself a check," and he says to me, "No, I don't want any check. This is strictly cash." [96]

Well, I told him that I didn't have no cash, and he told me that he would collect from me the next time he see me.

He told me in the meantime there was going to be a holiday, that he was going to be off for a few days, and this holiday that he took must have been four or five days because the following Tuesday I went back there and Dr. Gage was not there. So in the meantime—

Q. Now let's stop there. Did you, after you had the lunch with him at Santa Monica about October 3rd, did you observe as to whether you got more shoe orders than you had in the past? A. The following day; yes.

Q. How many shoe orders did you get the following day? A. About 12 pair.

(Testimony of Hubert Tomsone)

Q. Were they prescribed by Dr. Gage?

A. They were prescribed by Dr. Gage and this young lieutenant, whose name is—

Q. Strachan?

A. —Strachan, and also from Dr. Nie where Dr. Gage has told them.

Mr. Sullivan: Just a moment. We move to strike that as a conclusion and hearsay.

The Court: He hasn't said anything yet.

Mr. Sullivan: We will object to him testifying to what somebody else said. [97]

The Court: Objection sustained.

I don't understand the answer to your last question. The question was whether or not these shoe orders were signed by Dr. Gage, and you mentioned several other person's names.

The Witness: Yes, sir.

The Court: You mean they were signed by several persons?

The Witness: It was signed by two other doctors besides Dr. Gage.

The Court: Each prescription?

The Witness: Well, yes.

The Court: You mean each one had three names on it?

The Witness: No. You see, there are three doctors on the Facility who issue orders.

The Court: How many did Dr. Gage sign?

The Witness: Well, I do not recall.

The Court: All right.

By Mr. Neukom:

(Testimony of Hubert Tomson)

Q. Now on October 18th or thereabouts, Friday, were you out at the Facility or out at Dr. Gage's office?

A. Yes.

Q. And did you have a conversation with Dr. Gage there at his office on or about October 18th?

A. Yes, sir.

Q. Who was present?

A. In the office of Dr. Gage was Dr. Strachan, a veter- [98] an who was entitled to an artificial limb which was prescribed—

Q. I don't want you to go into the preliminaries, but I want to get where you were having a talk with Dr. Gage. Was anyone else present then? A. No.

Q. Did you have a cup of coffee with Dr. Gage in the afternoon, or a little after noon on October 8th?

A. At 3:30.

Q. Your answer is, you did? A. Yes, sir.

Q. Before that had you had a talk with Dr. Gage in his office? A. Yes.

Q. And about what time would you say that was?

A. It must have been about 3:15, because he was late.

Q. It was about 3:15, is that your answer?

A. Yes, sir.

Q. Will you tell us what was said?

A. Well, as I went inside in my room to take plastic casts and fittings of the veterans, Dr. Gage had arrived around about 3:30.

The Court: What he wants to know is what was said.

The Witness: Yes, sir.

It was said that if I brought the money out— [99]

By Mr. Neukom:

(Testimony of Hubert Tomsone)

Q. Who said that? A. Dr. Gage.

Q. What did he say? Just tell us as near as you can remember.

A. He says to me if I have the hundred dollars.

Q. What did you say? A. I say yes, sir.

Q. What else was said?

A. And I told him if he wants the money there now. He says to me, "Not here." He says to me, "Let's go down to the canteen to have a cup of coffee."

We went down to the canteen and I told him, "Do you want your money here?"

He said, "Not here." He say, "We will go outside."

As we were going outside—

Q. Who is we?

A. Dr. Gage and I. As we walked out there on the parking lot, he made me go near his car.

Q. Just state where you went to.

A. To the parking lot where his car was parked.

Q. All right.

A. It is in the parking lot of the Veterans Administration.

He say, "You can give it to me now." [100]

Q. Where were you? Were there any other cars there?

A. There were a lot of cars parked.

Q. Were there any people near the cars that you were near?

A. Well, the closest person was—there were four or five of them—was the FBI.



(Testimony of Hubert Tomsone)

Q. Was there anyone right near where you were with Dr. Gage near his car, anyone right up close to where you and he were?

A. Well, this particular person must have been about 150 feet away.

Q. When you got there, what did you do?

A. I took my money out of my pocketbook and I gave him the money.

Q. How much money did you give him?

A. \$100.

Q. Before that occasion had you made a list of the money that you had in your hand or in your pocketbook?

A. Yes, sir.

Q. Have you got the list here? A. Yes, sir.

Q. Will you please give it to me?

A. (Producing list.)

Mr. Neukom: May this be identified?

The Clerk: No. 7. [101]

(The list referred to was marked Government's Exhibit No. 7 for identification.)

By Mr. Neukom:

Q. You have shown me a little slip of paper, Government's Exhibit 7 for identification, and it has some writing upon it? A. That is right.

Q. There appear to be 20s, then certain numbers, 10s and certain numbers and 5s and certain numbers.

A. That is right.

Q. Is that your writing?

A. It is my wife's writing.

(Testimony of Hubert Tomson)

Q. It is your wife's writing?

A. It is my wife's writing because I discussed this matter with my wife.

Q. It is your wife's writing, that is your answer?

A. Yes, sir.

Q. But when you checked this list, your wife's writing, you had checked that with money that you had in your possession? A. Yes, sir.

Q. On the 18th of October?

A. We wrote the money number—

The Court: He asked you if you checked it with the list.

The Witness: Yes, sir. [102]

By Mr. Neukom:

Q. And you found that this list, the serial numbers, were they the same as the money that you had in your pocket? A. Yes, sir.

Q. Or in your billfold? A. Yes, sir.

Q. Now did you hand Dr. Gage some money—I don't know whether I asked you that or not—while you were near the car, did you hand him some money?

A. Yes, sir.

Q. How much money did you hand him?

A. \$100.

Q. I show you what appears to be a roll of bills, three 20s, three 10s and two 5s. Will you check that with the list and see if it is your recollection that this is the money that you handed to Dr. Gage?

A. (Examining list) Yes, sir.

Q. That is the \$100 you handed Dr. Gage there at the parking lot, is that correct? A. Yes, sir.

(Testimony of Hubert Tomsone)

Q. And this clip, was there a clip around the money?

A. Yes, sir.

Q. Will you fix it just the way it was, as you recall it, when you handed it to Dr. Gage?

A. (Illustrating) Like that. [103]

Q. What did Dr. Gage do with the money, as you observed?

A. He got the money and he put it in his left-hand pocket.

Q. Pants pocket?                      A. Pants pocket.

Mr. Neukom: I would like to offer in evidence Government's Exhibit No. 7 for identification, and likewise offer in evidence the hundred dollars in bills.

The Court: Both will be admitted as one exhibit.

(The articles referred to were received in evidence and marked Government's Exhibit No. 7.)

By Mr. Neukom:

Q. After you had handed Dr. Gage this money, what did you and he do?

A. We walked back inside in his office.

Q. There at the Veterans Administration?

A. At the Veterans Administration.

Q. We walked in?

A. We walked in and he locked the door shut.

Q. Did you then shortly after that leave Dr. Gage's office?                      A. Yes, sir.

Mr. Neukom: You may take the witness. [104]

(Testimony of Hubert Tomsone)

Cross Examination

By Mr. Sullivan:

Q. Mr. Tomsone, I understood you to testify on direct examination that you had been in the business of making orthopedic shoes since about 1928, is that correct?

A. I have been making orthopedic shoes since 1928.

Q. You haven't, however, been in business for yourself as an orthopedic shoemaker since 1928, have you?

A. No, sir.

Q. When did you first go into business for yourself, that is, in the business of manufacturing orthopedic shoes?

A. It is not manufacturing, it is custom-made orthopedic shoes.

Q. Well, making them then?

A. Yes, hand-made.

Q. When did you first go into that business for yourself?

A. In my own store?

Q. Yes. A. About eight years ago.

Q. That would be about 1938?

A. That is right.

Q. Prior to that time you had worked for other people who made orthopedic shoes, is that right?

A. That is right. [105]

Q. And you worked for various shoemakers prior to that time?

A. That is right; yes.

Q. Have you been in business for yourself continuously since 1938?

A. That is right.

(Testimony of Hubert Tomsone)

Q. When did you first have a contract with the Veterans Administration to make shoes for veterans?

A. About three and a half years ago, because this last contract is only about five or six months now. This is my fourth year.

Q. Is this the second or third contract you had with the Government?

A. This is my fourth.

Q. This present contract went into effect on the 1st of July of 1946?

A. That is right.

Q. Now Dr. Gage was not employed at the Veterans Administration when you obtained this contract which is now in existence, was he?

A. That is right.

Q. And you had no acquaintanceship with Dr. Gage until after he went to work out at the Veterans Administration?

A. That is right.

Q. When was it that you first met Dr. Gage? [106]

A. The day after Labor Day on Tuesday at 2:00 o'clock.

Q. That was in September of 1946?

A. That is right.

Q. You had been on your vacation for a period of time immediately preceding Labor Day of 1946, is that correct?

A. I came back Labor Day.

Q. How long had you been away on your vacation?

A. Three weeks.

Q. After you first met Dr. Gage on the Tuesday following Labor Day of 1946, you would see him on an average of about twice a week, is that correct?

A. Well, it would be twice a week through the week, but I see him 10:00 to 12:00 fifteen times each time every Tuesday and Friday at Sawtelle Hospital.

(Testimony of Hubert Tomson)

Q. What I mean by that, you might see him for a few minutes and do something else and then come back and see him again? A. That is right.

Q. But you saw him on an average of two days a week?

A. Well, two afternoons, from 2:00 to a quarter to 5:00.

Q. That was the occasion when you went there to procure whatever prescriptions had been ordered by the doctors in the orthopedic department for orthopedic shoes?

A. That is right. [107]

Q. And for corrections in shoes, is that correct?

A. Yes, sir.

Q. You didn't interview the veteran who had the prescription, that is, you didn't always make it a practice of interviewing the veteran who had the prescription for shoes at the Veterans Administration there, did you?

A. I don't understand what you mean.

Q. Well, what I mean is this, that many times a veteran would be given a prescription for a pair of shoes?

A. Yes, sir.

Q. And the first time you would see the veteran would be when he made an appointment and come into your shop to see you?

A. Well, in my shop or at the Veterans Administration.

Q. Yes, but there were many instances where you didn't see the veteran out at the Veterans Administration but saw him for the first time in your shop?

A. No, it could be in my shop or at the Veterans Hospital.

Q. Yes. A. Not on the outside.



(Testimony of Hubert Tomsone)

Q. It might be one of the two places?

A. That is right.

The Court: He wants to know if sometimes you didn't see the veteran and do your business at your shop and never see [108] him at the Administration.

The Witness: No. Many times they were sent to me with a prescription down at the shop for me to take the measurements of plastic cast.

The Court: Then would you see him later at the Veterans Administration?

The Witness: Yes, for approval from the doctor.

The Court: The veteran would have to be there?

The Witness: The veteran has to be there with his shoes.

The Court: When the doctor approves them?

The Witness: So that the doctor approves that the work is done correctly.

By Mr. Sullivan:

Q. In other words, that was after the shoes were made?

A. Yes, and also for conversation through the doctor how this shoe has to be built by Dr. Nie.

Q. You would often see the veteran there after the shoes had been made, is that right?

A. Not even fittings.

Q. Were all of your fittings had out at the Veterans Administration?

A. Not all of them, but when the veteran receives a shoe from me I am not allowed to give the veteran the shoe. These shoes has to go back to Sawtelle where a doctor, he has examined the workmanship and he has to

(Testimony of Hubert Tomsone)

sign that it has been [109] inspected by an M. D. The physician who puts his name on it would be Dr. Gage, it could be Dr. Nie or it can be the other young fellow, Dr. Strachan. So when the doctors put their name on there that he inspected the shoes, that means the shoes has been okayed by the physician for merchandise and workmanship.

Q. So it was your custom then after making these shoes to deliver the shoes out to the Veterans Administration at Sawtelle?

A. That is right.

Q. For the inspection and approval of the doctor who had written the original prescription?

A. That is right.

Q. Is that correct?

A. It has to be the doctor who wrote it. It don't have to be the doctor who wrote the prescription, it can be one of those three doctors.

Q. Even though the doctor who approved it might not have been the one who had wirtten the prescription?

A. That is right.

Q. But did you do that only in cases where you made new shoes, that is, new orthopedic shoes, or did you do that where you had to make some correction in a shoe which the veteran was already wearing?

A. Well, many times a shoe could be ordered from the [110] doctor. Many times those boys come from maybe 50, 75, 80 miles away from Sawtelle Hospital. That is what we call an outpatient. This certain patient sometimes don't have the facilities to travel back and forth so therefore the doctors many times prescribe this certificate for the work to be done on their own shoes, and

(Testimony of Hubert Tomsone)

they put on it "expedite." The only way we do this work, if we have this tag approved by the doctor with his signature that the man cannot return to the Facility because he is unable to get back in time, therefore the doctor will approve it and rely upon me to think that the work might be done right. But before I issue any orders out from my shop I make the veterans sign a card if the shoes are satisfactory to his foot, and if he is satisfied he signs it. I get that card back to the Veterans Administration where it shows that the man has been satisfied and he has got the shoes. I keep the receipt, and maybe 30, 60 days later I get my money for it.

Q. But it was your custom not to deliver the shoe to the veteran until he signed a card of acceptance that the shoes were satisfactory?

A. It is not my duty to deliver shoes to no veterans.

Q. I mean, there were some instances where you did deliver them to him?

A. Let me make this clear. When I get an order from Sawtelle and this shoe is supposed to be delivered by me, I [111] personally go myself and fit these particular people who have so much trouble with their feet. I want to make sure that the shoe is fitted properly so they can walk straight and that they will be happy and I will be happy so that I will not cheat them out of anything they got coming to them.

Q. There were some instances where you delivered the shoes directly to the veteran at your shoe shop, isn't that right?

A. Providing that those are marked "expedite" and signed by the physician.

(Testimony of Hubert Tomsone)

Q. But there were instances where you did that, isn't that true?      A. Sir?

Q. There were instances where you delivered the shoe direct to the veteran at your place of business?

A. I don't understand the word you say before.

Q. You don't understand what?

A. I don't understand the word that you told me before. Would you mind repeating it?

Q. Were there some occasions, some times, when you would deliver the shoe to the veteran at your place of business?

A. The way we do deliver these shoes, if the veteran has been fitted at Sawtelle for a plastic cast or by measurements, when these shoes are made and the veteran is unable to [112] come to Sawtelle to receive them, therefore we deliver those shoes to Sawtelle for inspection through the doctors so that the doctor can sign for the workmanship.

The Court: Just a moment. Will you read the question again?

(The question referred to was read by the reporter, as follows):

("Q. Were there some occasions, some times, when you would deliver the shoe to the veteran at your place of business?")

The Court: Now answer that yes or no. Then you can explain afterwards.

The Witness: If I deliver the shoes to the veterans—

The Court: Just a minute. Read the question again.

(Testimony of Hubert Tomisone)

(The question referred to was re-read by the reporter, as follows:

("Q. Were there some occasions, some times, when you would deliver the shoe to the veteran at your place of business?")

The Witness: Yes, sir.

By Mr. Sullivan:

Q. All right. Now whenever you delivered the shoe to the veteran at your place of business, did you require the veteran to sign a card of acceptance showing that the shoes were satisfactory to him? [113]

The Court: I think he answered that a while ago, counsel.

Mr. Sullivan: Maybe so.

The Court: He said he didn't do it unless he got an order to expedite and when they did they fitted them and he got a card and sent it to them and he kept a receipt.

By Mr. Sullivan:

Q. Now, then, you hadn't seen anything of Dr. Gage prior to the time that you went on your vacation in August of 1946?

Mr. Neukom: That has been asked and answered several times.

The Court: Objection sustained.

By Mr. Sullivan:

Q. The first conversation that you ever had with Dr. Gage was on the Tuesday following Labor Day of 1946?

A. That is right.

(Testimony of Hubert Tomsone)

Q. And it was in that conversation, if I understand your testimony correctly, that Dr. Gage said to you, "How is business"? A. No.

Q. Was it the following Friday that that conversation took place? A. That is right.

Q. In other words, it was the second time, or the second day that you ever met Dr. Gage? [114]

A. The second time of the week, not the second day of the week.

The Court: I think we all understand it was the second occasion that you saw Dr. Gage.

By Mr. Sullivan:

Q. And you say that you said to him, "Business is good"? A. That is right.

Q. And he said to you, "I don't think so"?

A. That is right.

Q. What did he say after that?

A. What did he say after that?

Q. Yes.

A. He say, "You kidding. I know. I have canceled a lot of your orders because they are men who were never entitled to shoes. Now you tell me that business is good, which I know you are just kidding."

Q. Well, had your orders fallen off up to that time?

A. It was, but I will not admit it to him because I didn't want him to interfere in my business.

Q. You objected to him interfering in your business?

A. That is right. I didn't want to have him to have any part in my business. My business is my own and I want to take care of it myself to my best ability to satisfy those veterans. [115]



(Testimony of Hubert Tomsone)

Q. As far as you were concerned you felt that you knew more about that business than he did?

A. No.

Mr. Neukom: I object. This is argumentative.

The Court: Objection sustained.

Mr. Neukom: I will accept the answer.

By Mr. Sullivan:

Q. Now you say that your business had fallen off up to that time?

A. I said it was but I have not said—

The Court: Just a minute now. You said it was. You have answered the question.

The Witness: Yes, sir.

By Mr. Sullivan:

Q. You engaged in somewhat of an argument with him at that time, didn't you?

A. Well, the argument was just a misunderstanding, that he wanted me to call him Dr. Gage and I wanted him to call me Mr. Hubert.

Q. You both got a little hot-headed at that time?

A. Not exactly. It was just conversation.

Q. It wasn't a particularly friendly conversation, however, was it?

A. I will not say it was unfriendly because a good understanding makes business good. [116]

Q. Now the next time that you saw Dr. Gage was the following Tuesday? A. That is right.

Q. And he told you at that time that one of you said to the other, "I am sorry that I talked to you that way last Friday"? A. He said that to me.

(Testimony of Hubert Tomson)

Q. He said that to you?

A. He said, "But I like you."

Q. But I like you? A. That is right.

Q. What else did he say?

A. He say he wants to talk to me.

Q. What about, did he say?

A. He says to me that he was not out here for his health, that he has to make money because he was only getting \$6000 a year.

Mr. Neukom: Go ahead. Have you finished?

The Court: Have you finished?

The Witness: No.

He says he has to make some money because he was only getting \$6000 a year, and he has been rejected for the second time from the Medical Association of California.

By Mr. Sullivan:

Q. He said he had been rejected for the second time [117] from the Medical Association of California?

A. That is right.

Q. Is that right? A. Yes.

Q. What else did he say at that time?

A. He couldn't get the license.

Q. Did he say anything else?

A. And he had to make some money, that he wanted to give me a proposition where we can both make a lot of money on this contract.

Q. Did he tell you anything further at that time?

A. I guess for that day, I think that is the best I can remember so far. There might have been some more discussion, but I don't recall.

(Testimony of Hubert Tomisone)

Q. You have no independent recollection of anything further that was said on that occasion?

A. There might have been said more, but I am giving you my explanation the best I can remember, the truth.

Q. When did you next see him and have a conversation with him?

A. Well, it must have been the following Tuesday or Friday.

Q. The following week sometime?

A. Well, it could have been in that same week; could have been on Tuesday or Friday. [118]

Q. What did he say to you on that occasion, and what did you say to him?      A. The following Friday?

Q. Yes.

A. Well, he just thought that if I thought it over, and I told him no, that I didn't think that I wanted to get into any mess like that.

Q. Was anything else said at that time?

A. There might have been.

Q. I mean, do you recall anything else that was said at that time?

A. Not at the present. There might have been said more.

Q. Was it on that occasion that you say he gave you this slip of paper with his address on it?

A. He says to me, he said—

The Court: Just a moment. Follow the question. Was that the occasion he gave you the slip of paper?

The Witness: That must have been the occasion, your Honor.

The Court: All right. You have answered the question.

(Testimony of Hubert Tomsone)

By Mr. Sullivan:

Q. Now Dr. Gage up to this time had complained to you from time to time about the shoes that you had been making on prescriptions that were reissued by the Veterans Adminis- [119] tration out there, hadn't he?

A. He had been asking me if I was making those shoes.

Q. And he told you that on various occasions that the shoes were not being made according to the specifications contained in the contract, didn't he? A. No.

Q. Never at any time did he make any statement to you about the shoes not being built according to the specifications contained in the contract?

A. No. He didn't say anything like that because his point of view was that I would play ball with him and he wouldn't dare to tell me those things because I would have given him a good answer.

Mr. Sullivan: I move to strike the answer as not responsive.

The Court: The answer is stricken. The jury is instructed to disregard it.

Mr. Neukom: Pardon me. The "no" may remain in?

The Court: Everything except the word "no."

Mr. Sullivan: That is all right.

The Court: Mr. Tomsone, if you just try to answer the question, follow the question closely and just try to answer it, then we will save some time and it won't take so long.

The Witness: All right.

(Testimony of Hubert Tomsone)

The Court: You will have an opportunity to explain any- [120] thing that you desire before you answer the question.

The Witness: Yes, sir.

By Mr. Sullivan:

Q. Did you ever have any conversation with Dr. Gage in which he told you that you were making an incorrect charge to the Government for lifts on shoes when you had a prescription to put a lift in a shoe and were charging the Government for an extension of the shoe?

A. Can I explain that, your Honor?

The Court: You can answer yes or no. If you can't answer it yes or no you can state that you cannot answer it yes or no.

The Witness: I cannot answer that question if you don't let me explain.

The Court: You can explain, but can you answer it yes or no and then explain?

The Witness: I can answer yes or no on this conversation, but I would like to explain.

The Court: You can explain, so answer it yes or no.

The Witness: Yes.

The Court: All right. Now you can explain.

The Witness: There are many types of orthopedic shoes done for the Government, as I said before. When we sign a contract the contract reads a build up of an inch is \$5, and every additional inch therefore is 50 cents. It could be an [121] inch and a half, which would be \$5.50. An inch and three-quarters would be \$5.50. An

(Testimony of Hubert Tomstone)

inch and seven-eighths would still be \$5.50. If you go over two inches it will be \$6.

On this particular case that you are trying to bring out so strong, I will explain it to you. When a doctor issues an order to me to build a shoe for a quarter of an inch I told the doctor that I thought it was too much. I told him the truth. I say, "But if it is a possibility that you would like to give me a non-contract item, then I will make that job cheaper than \$5," and he agreed to it. Instead of charging \$5 I charged \$2.50. When the job was completed he inspected that particular work, and as he inspected it if he did not like it he would tell me, "Hubert, this job is not done right, will you do it over again."

The Court: Did he say that to you?

The Witness: No.

The Court: We don't want what he would have said if something happened but just what he said.

The Witness: He would not say at that time no, but then there has been certain types of work that he had said that. I took the shoes back to the shop many times, and many times Dr. Gage he has made a mistake himself.

Mr. Sullivan: I move to strike that as a conclusion of the witness.

The Witness: No, I will tell you the reason. [122]

Mr. Neukom: I think it ought to go out.

The Court: It may be stricken. It isn't a question anyhow.

The Witness: Your Honor?

The Court: We will get around to that after a while. What he wants to know now is your explanation of this.

The Witness: The reason why I said that, your Honor, is because I saw a man over here yesterday—



(Testimony of Hubert Tomsone)

Mr. Neukom: Wait a minute. Don't argue with the Court. Just answer the questions.

The Witness: That is not arguing, this is a true fact.

The Court: I know, but you just answer the question. Have you finished your explanation?

The Witness: Not yet, your Honor.

The Court: All right. Leave out this other business.

The Witness: This man, Dr. Gage, sometimes he has prescribed—

The Court: Just a moment now. Mr. Tomsone, you are here as a witness and you are not here to conduct the trial of this case.

The Witness: Okay.

The Court: You will have to answer the questions and abide by my rulings on what you can say or what you cannot say. If you have finished your explanation about this particular transaction you may proceed with the examination. Have [123] you finished your explanation?

The Witness: No, I have not, your Honor.

The Court: All right.

The Witness: This particular shoe that sometimes there is mistakes prescribed when a man walks on the outside of the foot like this (illustrating), therefore it throws the balance of the foot. We usually put what we call a dutchman on the outside of the shoe, and we put an orthopedic here on the inside so that his foot will be twisted back to normal so that he can have balanced bearing when he walks instead of walking like that. (Indicating)

One time, as I recall—

The Court: Is this about this particular transaction?

The Witness: Yes, your Honor.

(Testimony of Hubert Tomisone)

The Court: All right.

Mr. Neukom: This is a shoe lift that he is asking about?

The Witness: Yes.

In this particular case this gentleman that has come to my shop two or three times, instead of the built on the outside of the shoe Dr. Gage has prescribed to put a built on the inside of the shoe. When the man received the shoe, instead of being balanced equally by building the inside on the sole, inside of the heel, naturally it will turn that man's foot out more and his ankle hurts more. So Dr. Gage asked me if I would please reverse this particular case because it [124] was a mistake, and I said, "All right, I will do that."

He say, "Will there be any charge?"

I say, "No."

By Mr. Sullivan:

Q. Was that the only instance?

A. No, there were several of them.

Q. There were occasions then when Dr. Gage had complained to you about the way the shoes had been made, is that right?

A. He has not complained to me.

Q. Never at any time? A. Never at any time.

Q. All right. Now as I understand your testimony—

The Court: Just a moment, counsel. I still want to get this explanation straight.

This was the occasion when you charged \$5 and he said that that was too much and you said that that is a minimum charge for an inch or less, isn't that right?

The Witness: That is right.

(Testimony of Hubert Tomsone)

The Court: And you said that if you will make it a non-contract item I will make it less than the contract calls for?

The Witness: That is right.

The Court: And you did in this instance?

The Witness: Yes, sir. [125]

The Court: All right.

By Mr. Sullivan:

Q. Now on this occasion when you say that Dr. Gage gave you his address on this slip of paper, you say that he asked you to come and see him at his home sometime?

A. The following Thursday night.

Q. The following Thursday night?

A. That is right.

Q. But you did not go to his home?

A. No, sir. I don't want to have nothing to do with him.

Q. You never at any time went to his home?

A. Never.

Q. But you did call him out at the Veterans Administration out there?

A. The following day. That was on Wednesday.

Q. On Wednesday? A. Yes.

Q. He didn't call you at your place of business?

A. No, he didn't call me. I called him.

Q. You phoned him? A. Yes, sir.

Q. And you told him you couldn't meet him at his home?

A. I told him that I couldn't go to his home. When I called the following day, it was on Wednesday morning

(Testimony of Hubert Tomson)

about [126] 10:30. Then he told me, "Why don't you come out here? I want to talk to you."

So I phoned Mr. Duncan and I told him that I was going—

Q. Just a moment.

I move to strike that.

The Court: It may be stricken, what he told Mr. Duncan, and the jury instructed to disregard it.

By Mr. Sullivan:

Q. But you were the one that phoned Dr. Gage and made the appointment to meet him out at Sawtelle?

A. Oh, no. I didn't want to make no appointment with him. He told me to come out anyway that day, that he wanted to see me.

Q. Then you went out there? A. That is right.

Q. Now that, as I understand it, was on the 3rd of October. A. Somewhere around there.

Q. How did you fix that time as being around the 3rd of October?

A. I didn't say it was the 3rd because I do not remember. I know it was on Wednesday.

Q. Was it during the month of October?

A. I don't remember. Yes, it was in the month of October. [127]

Q. And you went with him to the Mayfair Hotel in Santa Monica for lunch?

A. Just a minute. You say this was the 3rd you asked me?

(Testimony of Hubert Tomsone)

Q. I understood you to testify on direct examination that it was the 3rd of October. I am only taking your word for it.

A. Well, no, I am not sure but, you see, I come back from my vacation the day after Labor Day. That was on Monday. Tuesday I met Dr. Gage for the first time. It must have been in October.

Q. It must have been in October? A. Yes, sir.

Q. And you say that when you were in the Mayfair Hotel you saw Mr. Duncan in there?

A. It is not the Mayfair Hotel, it is the Mayfair Restaurant.

Q. The Mayfair Restaurant, I should say. You saw Mr. Duncan in the restaurant?

A. I did not see Mr. Duncan until after Dr. Gage and I, his wife came in the front of our table.

The Court: You didn't see Mr. Duncan until you finished the conversation?

The Witness: That is right. [128]

By Mr. Sullivan:

Q. Where was Mr. Duncan when you saw him?

A. He was right behind me.

Q. Standing right in back of you?

A. When I got up I saw him. I was facing his back.

Q. How close was he to you?

A. From here to there. (Indicating)

Mr. Neukom: Indicating about two and a half feet?

The Witness: Yes, something like that.

(Testimony of Hubert Tomsone)

By Mr. Sullivan:

Q. You didn't see him until you got up from the table?

A. That is right.

Q. Was he standing or was he seated at the table at that time?

A. At that time he was standing.

Q. With his back to you?

A. Well, I don't know if you would call it his back because I was sitting in this position here this way (indicating), Mr. Duncan was with his back turned to me. When I got up I done this way (indicating) and I saw him in there standing, and the side of his face, which would be on this side here. (Indicating)

Q. If I understand your testimony correctly, it was while you were having lunch at this Mayfair Cafe that Dr. Gage told you he would like to have \$100? [129]

A. He says to me that it would be a good idea for me to cancel my contract and for me to be his silent partner and for him to bid on a contract and open up a new orthopedic shop under the assumed name of Professional Orthopedic Shoes.

Q. He told you that down at the Mayfair Cafe?

A. Yes.

Q. Was that the first time that he ever suggested anything to you about you canceling your contract?

A. He told me before that that he thought it would be a good idea for me to give up my contract because if I would give up the contract that he knew someone on the outside who was tickled to death to take that contract and play ball with him.

Q. He said he knew someone on the outside who would be tickled to death to take the contract and play ball with him?

A. That is right.



(Testimony of Hubert Tomsone)

Q. What did you say about that?

A. I told him that I worked hard enough for this contract and I am going to stick to it. This has been through the war that I haven't made no money under this contract and I couldn't get good leather. I never went out and bought any black market merchandise. When I couldn't get very good leather, the first thing I done I went up to see Captain Bell, who was an assistant of Colonel Bringham at the Veterans Administration. [130]

Q. Is this part of the conversation with Dr. Gage?

A. Yes.

Q. All right.

A. I told him that I have to see personally Dr. Bell, that the merchandise that I was using was not the first grade as the contract required, but he asked me, "Hubert, do you think you can do a little bit better later on?"

And I say, "I think so. I am shopping around to try to find better merchandise all the time."

He said, "All right. As soon as you do that you let me know again." And when I got my first shipment of leather from the Pacific Hide & Leather Company—

The Court: Did you tell him this?

The Witness: Yes, sir.

The Court: All right.

The Witness: When I got my first shipment of leather from the Pacific Hide & Leather Company, I go up to see Dr. Bell and Dr. Bell told me, "It is all right. You go ahead and do as you have been performing before. Your work has been very satisfactory so far."

(Testimony of Hubert Tomsone)

By Mr. Sullivan:

Q. Well, now, after this present contract went into effect, that is, the contract which is now in existence, were you able then to get top grade of leather?

A. Now you mean? [131]

Q. Yes. A. Yes.

Q. And have you all during the time that you had this contract since July 1st, 1946? A. Yes, sir.

Q. That contract of course provides that the shoes are to be made out of prime grade leather?

A. That is right.

Q. And you have been using prime grade leather in all shoes under that contract? A. Yes, sir, I have.

The Court: I see it is 3:00 o'clock and time to take our recess.

(Short recess.) [132]

The Court: The usual stipulations?

Mr. Sullivan: Yes.

Mr. Neukom: Yes.

The Court: You may proceed.

Q. By Mr. Sullivan: Now, Mr. Tomsone, you testified on direct examination that following the day, following your conversation with Dr. Gage at the Mayfair Hotel that you received orders for 12 pairs of shoes. You are sure of that? A. Sir?

Q. You are sure of that, are you?

The Court: Read the question.

(Question read.)

The Witness: No, this was not at the Mayfair Restaurant. This was the day after when I saw Dr. Gage following Friday—the following Friday I received 12 pairs of shoes but not in the Mayfair Restaurant.

(Testimony of Hubert Tomson)

Q. By Mr. Sullivan: You didn't get the order down at the Mayfair? A. No, sir.

The Court: He said it was the following Friday, I think.

Q. By Mr. Sullivan: The day after the next Friday?

A. The following Friday.

Q. And you went to the Mayfair on Wednesday? [133] A. That is right.

Q. And it was the following Friday that you received this order for 12 pairs of shoes? A. That is right.

Q. Those were prescriptions that were written by either Dr. Gage or Dr. Strachan or Dr. Nie?

A. That is right.

Q. You have no independent recollection as to how many prescriptions were written by each one of those three gentlemen, have you? A. No, but—

Q. Now, let me ask you this—

The Court: Had you finished your answer?

The Witness: No, sir.

The Court: Go ahead and finish.

A. You see, Dr. Gage told me at the Mayfair Restaurant, "From today on you will see when you come out Friday, you will see how many pairs of shoes you have," and I received 12 pair from the veterans which he told me that he was going to instruct Dr. Nie and Dr. Strachan to issue an order on shoes.

The Court: Can you hear the witness now?

Several Jurors: Not very well.

The Court: Did you hear him, Mr. Juror, Juror No. 1?

Juror No. 1: Not very well.

The Witness: Do you want me to repeat it? [134]

(Testimony of Hubert Tomsone)

The Juror: No.

The Witness: When I left the Facility on Friday I received these 12 orders of new shoes.

Q. By Mr. Sullivan: Anything else?

The Court: Just a moment. The question was, do you remember how many of those orders Dr. Gage gave you?

The Witness: No, I don't, your Honor.

Q. By Mr. Sullivan: Now, you have already told us that the Friday following the Tuesday that you first met Dr. Gage, when you first had this conversation with him in which he asked you, "How is business?"—that would be the Friday following Labor Day. You told us that up to that time your business had fallen off some, is that correct?

A. I said that the business was falling off but I did not tell Dr. Gage.

Q. You did not tell him that? A. That is right.

Q. That it had fallen off up to that time. Now, had your business further decreased—that is, had you received less orders between that time and this Friday when you received the order for 12 pairs of shoes?

A. It increased from Wednesday to Friday.

Q. But up until Wednesday—between—withdraw that for a moment.

If you don't understand this, tell me, but between [135] the time that you had this first conversation with Dr. Gage in which he asked you how business was and this Wednesday sometime in October when you went to the Mayfair with him, had your business further decreased?

A. It decreased from—to that Friday, yes.

(Testimony of Hubert Tomsone)

Q. Do you recall that during the month of August you received orders for 14 pairs of shoes, don't you?

A. I don't remember.

Q. You don't remember?           A. No.

Q. Do you recall that during the month of August you received orders for 19 arch supports?

A. I don't recall that.

Q. Do you recall that during the month of August you received orders for 19 modifications of shoes?

A. I don't, but if you want me to prove it to you I will bring my books out and I will prove it to you.

Q. Well, do you recall that during the month of September you received orders for more shoes, more new shoes than you had received for the month of August?

A. I couldn't say that. I will be glad to prove it to you if you let me bring my books?

Q. Then you don't know whether your business fell off during this period of time or not, do you?

Mr. Neukom: This is argumentative. [136]

The Court: Argumentative, yes. Objection sustained.

Q. By Mr. Sullivan: Do you recall that during the month of September you received orders for modification of 33 pairs of shoes?           A. I don't remember.

Q. You have no recollection of it?

A. No, but I could prove to you if you let me bring my books.

(Testimony of Hubert Tomsone)

Q. Are you acquainted with a Mr. Fred Skill?

A. Yes, sir.

Q. Of Long Beach?           A. Yes, sir.

Q. Did you ever work for Mr. Skill?

A. Yes, sir.

Q. Are you also acquainted with a Mr. H. Sherman at a shoe repair shop down at 9th and Main Streets?

A. Yes. He passed away five or six years ago.

Q. You knew him, though?           A. Yes.

Q. You are also acquainted with Mr. Wright and Mr. Taylor who were with the Police Department in Long Beach, were you not?           A. Yes.

Mr. Sullivan: I think that is all.

The Court: Next witness. [137]

Mr. Neukom: I have no further questions. Mr. Duncan, will you take the stand? I would like to have Mr. Tomsone remain in attendance, your Honor.

The Court: You will remain in attendance. Mr. Tomsone.

Mr. Neukom: He can go today but I may want him later.

The Court: Will you want him also?

Mr. Sullivan: Not today.

The Court: You will remain near a telephone where either Mr. Neukom or Mr. Sullivan can get in touch with you. In the meantime you will be excused.

Witness Tomsone: I will stay here.



CHARLES M. DUNCAN,

called as a witness by and on behalf of the plaintiff,  
having been first duly sworn, was examined and testified  
as follows:

The Clerk: State your full name.

The Witness: Charles M. Duncan.

Direct Examination

The Clerk: Your address?

The Witness: Quarters 36, Veterans Administration  
Center, Los Angeles.

By Mr. Neukom:

Q. Mr. Duncan, what is your business or occupation?

A. I am employed by the Veterans Administration as  
assistant to the manager of the Center at West Los  
Angeles. [138]

Q. Who is the manager?

A. Colonel R. A. Brigham.

Q. And you were so employed during the months of  
September and October of this year? A. Yes, sir.

Q. Did you have occasion to talk with Mr. Hubert  
Tomsone with respect to matters that he reported to you  
that were transpiring between him and Dr. Gage? Just  
say yes or no. A. Yes, sir.

Q. When was the first time that was called to your  
attention?

A. The first time by Mr. Tomsone was on October 1st,  
1946.

Q. Prior to that in connection with your official  
duties, had any of your other co-associates spoken to you  
with regard to such a matter? A. Yes.

(Testimony of Charles M. Duncan)

Q. And when was the first date?

A. That was on September 30th.

Q. And is it part of your duties when working under the manager, to conduct investigations of any, or inquire in connection with, personnel?      A. Yes, sir.

Q. Did you have occasion on or about October 3rd, 1946 [139] to be present in a cafe known as the Mayfair Cafe or Restaurant in Santa Monica?      A. Yes, sir.

Q. Prior to that time had you witnessed around the hour of noon Mr. Tomsone meeting Dr. Gage?

A. Yes, sir.

Q. And where had you witnessed their meeting?

A. At the corner of Wilshire Boulevard and Sawtelle Boulevard.

Q. Was that in performance of your official duties or did you just happen to be casually there?

A. In performance of my official duties.

Q. Did you have occasion to follow the car driven by Mr. Tomsone which ultimately went to the Mayfair Cafe in Santa Monica?      A. Yes, sir.

Q. Did you have occasion to see Mr. Tomsone and Dr. Gage partake of lunch?      A. Yes, sir.

Q. You did not hear the conversation that ensued between them?      A. I did not.

Mr. Neukom: That is all.

Mr. Sullivan: I have no questions.

Mr. Neukom: Mr. Davis. [140]

HOWARD H. DAVIS,

called as a witness by and on behalf of the plaintiff,  
having been first duly sworn, was examined and testified  
as follows:

The Clerk: State your full name.

The Witness: Howard H. Davis.

The Clerk: And your address?

The Witness: 900 Security Building, Los Angeles.

Direct Examination

By Mr. Neukom:

Q. That is your business address, isn't it, Mr. Davis?

A. That is correct.

Q. What is your business?

A. 10975 Rose Avenue, is the home address.

Q. What is your occupation?

A. Special Agent, Federal Bureau of Investigation.

Q. Assigned to the Los Angeles office?

A. That is correct.

Q. And in the performance of your duties were you  
assigned to a matter in connection with the investigation  
of one Dr. Gage and one Mr. Tomsone? A. I was.

Q. And to your best recollection when were you first  
assigned to that?

A. Approximately October 1st. [141]

Q. This year, of course? A. Correct.

Q. And did you work in conjunction with Mr. Dun-  
can, the man who has just been on the stand?

A. I did.

Q. And did you have occasion during that investiga-  
tion to interview Mr. Tomsone? A. I did.

(Testimony of Howard H. Davis)

Q. On or about October 18, 1945, did you have occasion to observe Mr. Tomsone and Dr. Gage leaving the building where Dr. Gage's office is located there at the Outpatient offices? A. I did.

Q. What was the hour?

A. Approximately three o'clock in the afternoon.

Q. And did you observe where they went?

A. I did.

Q. Where did they go?

A. They first went to the canteen, which is in the same building but located down the corridor. They stayed there for, I would say, approximately ten minutes, at which time they both left the canteen and proceeded through the corridors to the outside of the building and to an auto park in the rear of the building. They stayed in that park for several minutes, at which time I observed them returning from [142] the auto park and I noticed that Dr. Gage was folding something between the fingers of both hands. They returned then—

Q. Now, let me interrupt. Prior to that occasion had you had occasion to make a list of \$100.00—an aggregate of \$100.00 in United States money? A. I had.

Q. And who had that money?

A. Mr. Tomsone had it.

Q. And you had talked to Mr. Tomsone about what time? A. Approximately 1:30 p.m.

Q. There at the Facility?

A. In the office of Mr. Duncan.

Q. At the Facility? A. At the Facility, yes.

Q. And had you made a list, comparable lists, as to the serial numbers of the money that Mr. Tomsone had?

A. I had.

(Testimony of Howard H. Davis)

Q. Do you have that list? A. I have.

Mr. Neukom: Does counsel care to see this?

Mr. Sullivan: That is right.

Mr. Neukom: Will you mark this Government's exhibit next in order.

The Clerk: Government's Exhibit 8, for identification.

(The document referred to was marked as Government's Exhibit 8, for identification.) [143]

Q. By Mr. Neukom: Is Government's Exhibit 8 for identification the list of the serial numbers and the description of the bills that Mr. Tomsone handed you for you to inspect and make a list of them? A. It is.

Q. And when you handed me this money, that is, Government's exhibit—part of Government's Exhibit 7 as I was examining Mr. Tomsone, you had had that money in your possession—I should have said Exhibit 8. You had had that money in your possession for some time, had you not?

A. It was in the office safe of the FBI.

Q. And you have examined that money with the list that is Government's Exhibit 8, is that correct, the serial number? A. I have.

Mr. Neukom: Let me straighten the record. Government's Exhibit 8 is the serial number, and Government's Exhibit 7 is the money? A. Yes.

Q. And they correspond?

A. They correspond, yes.

Q. Then you had given this money to Mr. Tomsone, is that correct? A. That is correct.

(Testimony of Howard H. Davis)

Mr. Neukom: I would like to offer Government's Exhibit 8 into evidence now, your Honor. [144]

The Court: It is admitted.

(The document referred to was marked as Government's Exhibit 8, and was received in evidence.)

Q. By Mr. Neukom: Now, after this incident and you saw Mr. Tomsone and Dr. Gage returning from the auto park back of the Facility, as I understand it, what did you see them do then?

A. They returned—re-entered the building and went back to Dr. Gage's office on what I believe is the ground floor and entered the office. We waited a short period of time to allow everything to clear. We had received a signal from Mr. Tomsone that the transaction had taken place. We then entered—

Q. Now, you say "we"?

A. "We" consisted of myself and Special Agent Malloy, Special Agent Leonard Augustson and Mr. Gordon L. Howe of San Francisco.

Q. You entered Dr. Gage's office?

A. That is correct.

Q. And you found him there?

A. Found him there.

Q. What did you say to him?

A. At the time we entered there was a patient there and an elderly doctor, who were requested to leave and the doctor advised he was under arrest and that anything he said [145] could be used against him in court.

Q. What did the doctor say or do?

A. Right at that moment he didn't say anything.



(Testimony of Howard H. Davis)

Q. You are referring to the doctor as being the defendant here? A. Dr. Gage.

Q. Later, within a matter of a few minutes, did he say anything or did you do anything?

A. We requested him to stand up. That is, I requested him to stand up and told him we were going to search him as we understood he had received some money. He stated as we started to search him, "It is in my left pocket," and started to reach for it and we told him not to do it, that we would take it out. Special Agent Malloy took it out of his pocket and handed it to me. About that time the doctor made the statement, "I expected this; I knew this would happen."

Q. Is that about the extent of the conversation that occurred the day that you placed him under arrest?

A. At that time in the office, yes.

Q. And you later took him to the offices of the FBI?

A. Correct.

Q. And he was booked in the County Jail, is that correct? A. That is correct.

Q. In connection with this investigation and on or [146] about October 15, 1946, did you have occasion in conjunction with Mr. Duncan of the Veterans Administration, to be listening upon a listening device in another room, to conversations that were taking place in the office of Dr. Gage? A. I did.

Q. On the afternoon, at the hour of close to two o'clock—and may I inquire first, during the conversation that you were listening to upon a listening device in an adjacent room, did you hear a voice which later appeared to be the same voice as the Dr. Gage whom you arrested on October 18th? A. I did.

(Testimony of Howard H. Davis)

Q. And did you at some time during that conversation hear a voice which appeared to be similar to the voice of Mr. Tomsone whom you had theretofore interviewed and talked to?      A. Yes, sir; I did.

Q. And will you relate, and if you have no notes on the matter which will assist you in refreshing your recollection, unless you can recall it without notes—which is the case?

A. Well, I can generally recall the conversation. However, I have notes covering the period in question.

Mr. Sullivan: Mr. Neukom, what was the date of this?

Mr. Neukom: October 15th.

Q. Did you hear a voice make any reference to money?

A. I did. [147]

Q. What voice was that—what person was speaking?

A. Mr. Tomsone.

Q. What do you recall that he said?

A. He said, "I couldn't bring the money with me this time" or words to that effect.

Q. Did you hear another voice after that?

A. Yes, I did.

Q. And whose voice was that?

A. The defendant's, Dr. Gage.

Q. And what did that voice say?

A. He said, "That is all right, don't worry about it."

Q. Did you hear any further conversation?

A. The conversation became inaudible at times—appeared to be whispering. However, I heard Dr. Gage say, "Friday, uptown" and I heard Tomsone's voice answer, "Friday", which appeared to be in a questioning voice from the tone used.

(Testimony of Howard H. Davis)

Q. What else was said?

A. Then the next sentence I heard was Dr. Gage saying, "I had just as soon do business with you."

Q. And is that the extent of the conversation as nearly as you recall?

A. Relating to the question of money, yes. There was other conversation between the individuals appearing to be Dr. Gage with a patient and other things that did not concern [148] it.

Q. That was at an earlier time?

A. And shortly after they talked about Boston braces and where they were made and things like that—how to get their name.

Mr. Neukom: That is all.

Mr. Sullivan: I just have one or two questions, your Honor.

#### Cross Examination

By Mr. Sullivan:

Q. On this occasion, on October 19th, when you saw Dr. Gage and Mr. Tomson go from the canteen out of the building and over to the auto park, you watched them while they were in the auto park, did you?

A. They disappeared from my sight within the midst of the cars in the auto park.

Q. And then after disappearing from your sight you next saw them as they were coming back toward the building?

(Testimony of Howard H. Davis)

A. Before they cleared the auto park, yes.

Q. Before they left the auto park?

A. That is right, sir.

Q. And you say that you observed at that time that Dr. Gage was carrying something in his hand?

A. Holding something between the fingers of both hands.

Q. Did you continue to watch him as he was folding this? [149]

A. Until I had to switch from behind a car and get at a different angle there. I lost track of the situation of the hands.

Q. How far away from him were you at that time?

A. I would say approximately at the time they were clearing the entrance of the auto park perhaps 100 feet.

Q. Were you close enough that you could see what it was he was folding in his hand?

A. Just generally what it appeared to be.

Q. What did it appear to you to be?

A. It looked as far as texture, it looked dark as far as I know, and the position of his hands. It would appear to be about the size of money.

Mr. Sullivan: I think that is all I have. No further questions.

Mr. Neukom: Mr. Malloy.

PAUL MALLOY,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Paul Malloy.

The Clerk: What is your address?

The Witness: 259 - 25th Street, Santa Monica. [150]

Direct Examination

By Mr. Neukom:

Q. Mr. Malloy, were you present at the time of the arrest—what is your business or occupation?

A. Special Agent with the Federal Bureau of Investigation.

Q. And were you such in October of this year?

A. I was.

Q. Did you have occasion to be present at the time of the arrest of Dr. Gage? A. I was.

Q. On the day of October 18th?

A. That is right.

Q. Along with Agent Davis? A. Yes.

Q. I show you Government's Exhibit No. 9 for identification, which I believe is not in your handwriting but bears initials—PJM. Is that your—are those your initials?

A. Yes.

Q. It appears to give a list of 20's, 10's, 5's dollar bills and their serial numbers. Were you present when the \$100.00 was taken from the pocket of Dr. Gage?

A. Yes; I was the one who removed it from his pocket.

Q. Of Dr. Gage? A. Yes. [151]

(Testimony of Paul Malloy)

Q. Did you check to ascertain whether or not what the serial numbers were upon that money that was taken from his pocket? A. Yes, sir, I did.

Q. And is that reflected on the instrument, Government's Exhibit No. 9, which is before you?

A. Yes, it is.

Q. And are those serial numbers the same as the serial numbers of the money that Mr. Tomsone—that had previously been checked into the possession of Mr. Tomsone? A. Yes, it is.

Mr. Neukom: I would like to offer in evidence Government's Exhibit No. 9.

The Court: It is admitted. Is this another list?

Mr. Neukom: This is the list after the arrest and there was a re-check.

The Court: Exhibit 8 is the list which Agent Davis made.

Mr. Neukom: That is right.

The Court: Very well.

Mr. Neukom: And Exhibit 7 is the money of Tomsone.

(The document referred to was marked as Government's Exhibit 9, and was received in evidence.)

Q. By Mr. Neukom: Mr. Malloy, prior to the arrest did you have occasion to see Dr. Gage and Tomsone leave his [152] office and go to the canteen?

A. Yes, I did.



(Testimony of Paul Malloy)

Q. Just relate briefly what you saw after that?

A. Dr. Gage came into his office at approximately 2:15 of that date and he had several short conversations with Tomsons. Tomsons went in the office one time and came out again and then at approximately three o'clock Dr. Gage came out of his office and Mr. Tomsons was passing in the hall at the time and I heard Dr. Gage say to him—Tomsons, "How about a cup of coffee?" and it was approximately five minutes after that that Dr. Gage again came out of his office, having returned to it, and he joined Mr. Tomsons in the hall. They went down the hall and turned in the corridor to the left leading down to the canteen of the building, and went on down in that direction. I followed them and they made again a left turn and I then lost sight of them, and in a few minutes I went down to the canteen and saw them sitting at the counter of the canteen.

Q. Did you see them in the parking lot after that?

A. No, I did not.

Mr. Neukom: That is all.

Mr. Sullivan: I have no questions.

Mr. Neukom: The Government rests, your Honor.

Mr. Sullivan: Shall we proceed, your Honor.

The Court: Do you wish to make an opening statement? [153]

Mr. Sullivan: No, I have no desire to make an opening statement. I would like to proceed with my evidence.

The Court: Very well.

## HERBERT OUTEN AMREIN,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name and address.

The Witness: Herbert Outen Amrein.

The Clerk: And your address?

The Witness: 866 West Mount Drive, Los Angeles.

## Direct Examination

By Mr. Sullivan:

Q. What is your business or occupation, Mr. Amrein?

A. At the present time I am writing and doing some research work on my own.

Q. Are you acquainted with Dr. Theodore Gage, the gentleman seated at the counsel table? A. Yes, sir.

Q. How long have you known Dr. Gage?

A. Approximately ten months.

Q. And during that period of time has he resided here in Los Angeles County?

A. I believe so. I am not certain of that.

Q. Are you acquainted with other people that know him? [154] A. Yes.

Q. Friends and acquaintances? A. Yes, sir.

Q. Mutual friends and acquaintances of both of you?

A. Yes, sir.

Q. Are you familiar with his general reputation for honesty and integrity and as a law-abiding citizen?

A. Yes, sir.

Q. Is it good or bad? A. It is very good, sir.

Mr. Sullivan: Thank you, cross examine.

Mr. Neukom: No questions.

Mr. Sullivan: Mr. Kramer.

MELVIN KRAMER,

called as a witness by and on behalf of the defendant,  
having been first duly sworn, was examined and testified  
as follows:

The Clerk: State your full name.

The Witness: Melvin Kramer.

The Clerk: And your address?

The Witness: 1434 Kelton, Los Angeles 24.

Direct Examination

By Mr. Sullivan:

Q. What is your business or occupation, Mr. Kramer?

A. I am the owner of the Zanzibar Cafe in Santa Monica, [155] California.

Q. Are you acquainted with Dr. Theodore Gage, the gentleman seated at counsel table? A. I am.

Q. How long have you known Dr. Gage?

A. 15 years.

Q. Did you know him prior to the time he came to California? A. Yes, I did.

Q. And are you acquainted with other people that have known him in the community in which he has resided?

A. I know many people that know him.

Q. Are you familiar with his general reputation for honesty and integrity in the communities in which he has resided? A. I am.

Q. Is it good or bad? A. It is very good.

Q. That is all, thank you.

(Testimony of Melvin Kramer)

Cross Examination

By Mr. Neukom:

Q. Mr. Kramer, are you in any wise related to Dr. Gage?

A. Only through marriage. I am not directly related to Dr. Gage. His wife is my cousin. [156]

Q. His wife's maiden name was Kramer, is that right?

A. That's right.

Mr. Neukom: That is all.

Mr. Sullivan: Mrs. Lifland.

NELL LIFLAND,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Nell Lifland.

The Clerk: What is your address?

The Witness: 6454 San Vincente.

Direct Examination

By Mr. Sullivan:

Q. Mrs. Lifland, what is your occupation, please?

A. Advertising for newspapers.

Q. Are you acquainted with Dr. Theodore Gage, the gentleman seated at the counsel table? A. I am.

Q. How long have you known Dr. Gage?

A. I have known him about 10 years.

Q. Are you acquainted with people that have known him—that is, mutual friends and acquaintances in the community in which he has resided?

A. I do. [157]

(Testimony of Nell Lifland)

Q. Are you familiar with his general reputation for honesty and integrity and as a law-abiding citizen?

A. I have always known him to be honorable.

Q. You are familiar with his general reputation?

A. I am familiar.

Q. Is it good or bad? A. It is good.

Mr. Sullivan: You may cross examine.

Mr. Neukom: No questions.

The Court: Next witness.

Mr. Sullivan: Dr. Gage.

THEODORE S. GAGE,

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Theodore S. Gage.

The Clerk: And where do you live?

The Witness: 2509 Santa Monica Boulevard.

Direct Examination

By Mr. Sullivan:

Q. Dr. Gage, you are the defendant in this matter, are you not? A. Yes, sir, I am.

Q. And what is your profession or occupation?

A. I am an orthopedic surgeon. [158]

Q. Are you licensed to practice in the State of California?

A. No, I am not licensed to practice in the State of California.

Q. Are you licensed to practice as an orthopedic surgeon in any other state? A. Yes, sir.

(Testimony of Theodore S. Gage)

Q. In what states are you licensed to practice?

A. Illinois and Missouri.

Q. Are you a graduate of any medical school?

A. Yes, sir.

Q. What medical school?

A. Loyola Medical College, Chicago, Illinois.

Q. And when did you graduate from medical school?

A. 1928.

Q. Following your graduation from medical school did you serve as an interne in any hospital or institution?

A. Yes, I did.

Q. Where was that?

A. At Columbus Hospital, Chicago, Illinois.

Q. How long of an internship did you serve there?

A. One year.

Q. Now, have you following your graduation from medical school and your internship specialized in any particular branch of the medical profession? [159]

A. I did general practice for approximately the first two years after I left my internship, and then specialized thereafter.

Q. In what branch of medicine or surgery did you specialize?

A. I specialized in orthopedic surgery.

Q. And have you had some special training in that respect?

A. Yes, sir, I have.

Q. And what training have you had so far as orthopedic surgery is concerned?

A. I served a preceptorship of approximately five years under Drs. Phillip Kruser and Frederick Muller of Chicago.



(Testimony of Theodore S. Gage)

Q. What do you mean by "preceptorship"?

A. I was associated as assistant to these men and got my training under them.

Q. And did they specialize in some particular branch of medicine or surgery?

A. They specialized in orthopedic surgery only.

Q. And when did you finish your preceptorship with them?

A. Approximately 1935.

Q. And did you thereafter go into practice for yourself?

A. Yes, sir, I did. [160]

Q. And where did you engage in practice? Thereafter?

A. In the City of Chicago at that time.

Q. And after going into practice for yourself did you specialize in any particular branch of medicine or surgery?

A. I limited my practice from then on to orthopedic surgery entirely.

Q. And how long thereafter did you continue to practice for yourself as an orthopedic physician and surgeon?

A. From that time on until my entrance into the Service.

Q. When did you enter the Service?

A. In 1942.

Q. And in what capacity did you enter the Service?

A. I entered as a commissioned officer in the United States Army Medical Corps.

Q. And were you assigned to any particular work or branch of medicine or surgery while in the Army?

A. Yes, sir.

Q. What particular branch of medicine or surgery were you assigned to in the Army?

A. I was assigned to orthopedic surgery.

(Testimony of Theodore S. Gage)

Q. And how long did you remain in the Army?

A. Until May 3rd, 1946.

Q. And during all of that time you were in the Army [161] were your activities confined principally to orthopedic surgery?

A. It was confined entirely to orthopedic surgery here in this country and in Europe.

Q. And you received your discharge then in May of 1946? A. That is right.

Q. Now, where were you practicing orthopedic surgery at the time of your entry into the United States Army?

A. Kansas City, Missouri.

Q. And where were you when you were discharged from the Army?

A. San Francisco, California. I was discharged from Letterman General Hospital. I was, rather, retired for disability.

Q. Following your discharge did you return to your former home in Kansas City?

A. No, not at that time.

Q. Did you thereafter come to Los Angeles County?

A. I came to Los Angeles in February of 1946.

Q. And did you come here at that time to make your home or were you here then merely on a visit?

A. No, not at that time. I had no intention at that time of making my home here.

Q. How long did you remain here? [162]

A. I remained here approximately three months while taking a post-graduate course.

Q. You took some post-graduate work in surgery or medicine?

A. Orthopedic surgery, some advanced special work.

(Testimony of Theodore S. Gage)

Q. Where did you take that post-graduate work?

A. At the College of Medical Evangelists, Los Angeles, California.

Q. Where is that located?

A. It is in Los Angeles, on Boyle Street.

Q. And following the completion of your post graduate work there what did you do?

A. I took the California State Board examination in March.

Q. That is, you mean—

A. The reciprocity examination between Illinois and the State of California.

Q. Was that examination which you took for the purpose of endeavoring to be licensed to practice medicine and surgery in the State of California?

A. That is correct, sir.

Q. You took that examination in March of this year?

A. In March of this year, yes.

Q. And were you thereafter informed as to what the result of that examination was? [163]

A. I was informed that I had failed.

Q. And what did you do thereafter?

A. I returned to Kansas City.

Q. How long did you remain back there?

A. I remained in Kansas City for approximately six weeks.

Q. When did you next come to California.

A. I came back to California in July, approximately July 29th, to take the August California State Board examination again.

(Testimony of Theodore S. Gage)

Q. And did you thereafter take another California State Board examination?      A. Yes, I did, sir.

Q. And when did you take that?

A. I took that August 3rd, 1946.

Q. And at the time that you took that examination were you employed anywhere?

A. I had just begun—I hadn't—the employment had been consummated. I had made a commitment of employment but had not begun until the 5th of August.

Q. You had—you say you had made a commitment for employment? What steps had you taken to secure employment at that time or about that time?

A. I had no desire for employment except that when I came here to take that State Board examination in August I [164] had a letter from Dr. Long stating that there was an opening and that my name had been recommended and if I was interested to see him, and since I knew that I was going to take the State Board examination in August, and not figuring on failing at the second time, I took the position as in interim job.

Q. You say as an interim job. You mean—

A. Until I found out whether I had passed the California State Board examination.

The Court: What job was it that you took?

The Witness: The orthopedic surgeon's job at the Veterans Hospital.

Q. By Mr. Sullivan: And was it your intention if you passed the California State Board examination to engage in private practice?

A. That was the understanding I had with Dr. Long when I accepted the position.

(Testimony of Theodore S. Gage)

Q. In other words, you had some conversation with him at the time in relation to the possible length of time that your employment might last out there?

A. That is correct, sir.

Q. What did you say to Dr. Long about that and what did he say to you?

A. I told him that I was not particularly interested in an outpatient job since it entailed a lot of administration and I was not particularly interested in administration. My [165] work was entirely confined to operative surgery and reconstructive surgery, but that it was purely an interim thing—that I only wanted the job until I knew that I had passed, and at that time he said to me, "We would much prefer to have you full time and permanently. Your qualifications are the kind we want."

And I said, "Well, that would all depend upon whether I pass the examination or not," but my mind was made up at that time, that I was going to leave the minute I knew I had passed the examination.

Q. Did you then thereafter go to work at the Veterans Administration?      A. I did, sir.

Q. And in what capacity were you employed?

A. As the chief of the orthopedic outpatient service.

Q. And what did your duties consist of in that position?

A. Well, my duties were two-fold. They were administrative and professional. As chief I had to examine patients and prescribe for orthopedic devices and supervise the two assistants assigned to that department. The administrative end consisted of ordering braces, artificial prosthesis, arms and legs, and the ordering or prescribing of orthopedic shoes and their correction.



(Testimony of Theodore S. Gage)

Q. Now, in connection with your duties there at the [166] hospital did you have occasion from time to time to examine veterans who were patients of the out-patient department there in relation to the need or necessity of being furnished with orthopedic or corrective footwear? A. I did, sir.

Q. And when these patients came in there for an examination was there any chart or folder or history of any kind of their case that accompanied them?

A. There was.

Q. And did you make some inquiry to determine where you were to order—from what source you were to obtain, let us say, orthopedic shoes or corrective shoes, when you found occasion to have to prescribe such orthopedic articles for these patients? A. I did.

Q. And what inquiry did you make to determine from what source those things were to be obtained?

A. I was informed by my clerical help there that the contract was held by one Hubert Tomsone and that all orders for orthopedic shoes and any correction footwear had to go to his company.

Q. Now, thereafter did you have occasion to see and inspect any contract that existed between the Veterans Administration at Sawtelle and Mr. Hubert Tomsone for the furnishing of orthopedic or corrective shoes? [167]

A. Yes, I did.

Q. And did you become familiar with the content of that contract and its provisions? A. I did.

Q. Now, in connection with your duties at the Veterans Administration at Sawtelle did you ever have occasion to examine any veterans where you reached a con-



(Testimony of Theodore S. Gage)

clusion as an orthopedic physician and surgeon, that it was not necessary that the veteran be furnished with orthopedic or corrective shoes?      A. Yes, sir, I did.

Q. Now, what was your custom—

The Court: We will take a short recess as the Grand Jury is ready to report.

(Short recess.)

The Court: The record will show we are resuming the trial with the defendant present on the stand and the jury present and in the jury box.

Mr. Sullivan: Yes, your Honor.

Q. Dr. Gage, on those occasions where you made an examination of a patient and determined that, in your medical opinion as an orthopedic surgeon, it was unnecessary to prescribe orthopedic or corrective shoes, what did you do insofar as making any record of your findings and recommendations are concerned? [168]

A. I wrote my examination of the condition present, my reasons for refusing the request of the veteran for orthopedic shoes in the folder that accompanied the patient upon the time of the examination.

Q. And upon conclusion of the examination and your report, written report, which went into the folder, what happened to the folder insofar as that particular veteran was concerned?

A. The folder was placed in the outgoing basket on my desk and from there went to the orthopedic clerk's office and the chief clerk usually went through those folders to determine what prescriptions had been written for that day, and whenever they found a prescription they would type it up, the initial purchase order.

(Testimony of Theodore S. Gage)

Q. As I understand it, the folders were not kept in your own individual office after you had concluded with them?

A. As a rule they were not. There were only one or two exceptions. Whenever I had a patient that I was conducting a long series of examinations on, in those cases I might have kept the folder in my desk, but no recommendation for treatment had been entered as yet.

Q. As soon as you had completed your examination and consultation with the patient and reached your conclusions the case was closed so far as you were concerned and was sent back? [169]

A. That is correct.

Q. Now, who was your immediate superior at the Veterans Administration there?

A. At the time of my entrance upon my duties at the Veterans Hospital there were two doctors—Dr. Long was the chief medical officer and Colonel Strachan was the assistant.

Q. And for both Dr. Long and Colonel Strachan they were assigned to the Regional Office?

A. That is correct. We all worked out of the Regional Office.

Q. Was Colonel Strachan a doctor also?

A. Yes; he was a Lieutenant Colonel in the Medical Corps on active duty with the Veterans—assigned there for duty.

Q. And in the department to which you were assigned, that is, the orthopedic department, did you have any other

(Testimony of Theodore S. Gage)

doctors to assist you in the work which you were performing there?

A. At the time I took over the department there was one doctor, Dr. John Nie, who was an elderly gentleman and had been with the Facility for some 17 years or so.

Q. Thereafter was it necessary for you to ask for any further assistance, further doctors to assist you?

A. Yes, it was. [170]

Q. And did you—

The Court: Pardon me, counsel. I was wondering if we might not save time by recessing now and the lawyers in the case consult with me in my chambers concerning the instructions?

Mr. Sullivan: All right, your Honor.

The Court: May I inquire how many more witnesses you have? If you think the case will get to the jury tomorrow I think we had better get the instructions out of the way this evening.

Mr. Sullivan: That probably may depend on how late in the day your Honor might want to give the case to the jury.

The Court: Sometime tomorrow?

Mr. Sullivan: Yes, your Honor.

The Court: I would prefer to finish the case tomorrow if I can because I have another case set for Friday.

Mr. Sullivan: Yes, your Honor. I see no reason why we cannot conclude—certainly conclude this evidence tomorrow, your Honor. I do have a number of witnesses. I may after going into a huddle tonight determine to eliminate some of them. I am not sure of that as yet. But even if I should call them, there are none of them

(Testimony of Theodore S. Gage)

that I anticipate will take any great length of time to examine, either on direct or cross examination.

The Court: In addition to this witness? [171]

Mr. Sullivan: That is right, in addition to this witness.

The Court: Well, we will proceed for a few moments more and if you gentlemen can be here at 9:30 it may be more convenient than this evening.

Mr. Sullivan: As far as I am concerned, your Honor, that is satisfactory to me.

The Court: Well, we can recess at this time if you will be here at 9:30 in the morning. I think we can go over the instructions in a half hour.

Mr. Sullivan: All right.

The Court: I think this is a convenient time to recess. It is almost 4:30. We will recess until 10:00 o'clock tomorrow morning, at which time the jury will return to its place in the jury box.

(Whereupon, at 4:25 o'clock p.m., a recess was had until 10:00 o'clock a.m., December 12, 1946.) [172]

\* \* \* \* \*

Los Angeles, California, December 12, 1946, 9:30 a.m.

(The following proceedings were had in chambers and without the hearing and presence of the jury:)

The Court: Are you ready, gentlemen?

Mr. Sullivan: Yes.

Mr. Neukom: Yes, your Honor.

The Court: The record will show the defendant is present in person and by his counsel.

Now, on the matter of general instructions—you are familiar with them, Mr. Sullivan?

Mr. Sullivan: That is right, Judge.

The Court: As to general instructions, without going over them now and reading them here, it takes about 25 or 30 minutes.

Mr. Sullivan: Yes.

The Court: You are familiar with them?

Mr. Sullivan: Yes.

The Court: Would they be satisfactory to you?

Mr. Sullivan: They are satisfactory; yes, sir.

The Court: That would take up many of the instructions that you have submitted here.

Mr. Sullivan: That is correct, your Honor.

The Court: So that we should devote our attention to the instructions which apply specifically and particularly to [176] this case.

Mr. Sullivan: Yes.

The Court: Let us take up the Government's instructions.

Government's proposed instruction No. 1 is a quotation of the statute.

I think we can probably omit reference to the house or Congress or Committee of either House and just go into the pertinent things:

"Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof," and omitting then down to:

"shall ask, accept or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, \* \* \*"

The only thing he is charged with is receiving money, so why put all these other long words in here?

Mr. Neukom: I just merely quoted the statute.

The Court: "shall ask, accept or receive any money \* \* \* with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be [177] brought before him in his official capacity, or in his place of trust or profit, influenced thereby shall be \* \* \* guilty of a crime."

Mr. Neukom: We ought to leave the words "gratuity and promise" in there and strike the other.

The Court: "who shall ask, accept, or receive any money or any promise or gratuity," is that it?

Mr. Neukom: That is right, and the rest can go out.

The Court: "with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may be law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be guilty of a crime."

I shall also add to this:

"An appropriate punishment is provided, but you are not to be concerned in your reasoning or your conclusion with punishment."

Any objection to that?

Mr. Sullivan: No objection to that.

The Court: Instruction No. 2. The indictment has not been read: it has merely been sketched.

Mr. Sullivan: I will read it. I generally do so as a short indictment. [178]

The Court: All right.

"\* \* \* both counts have been brought under the same statute just read to you."



The next sentence can go out. That sentence starts, "The statute pertains—" and so forth.

Mr. Neukom: Yes.

Mr. Sullivan: That goes out.

The Court: That goes out.

Now, if I summarize them I have to summarize all the elements of the offense, I think, which you have done under the first count, but under the second count you have not. In other words, I think it might be reversible error if I simply said, "The second count is substantially the same as the first except it charges the defendant did accept and did receive the bribe referred to in Count 1," because it must be accepted and received by him in his official capacity and so forth.

Mr. Neukom: Then, why can't you add—you can make them both brief by just saying the first count charges that on or about October 3rd, 1946—

The Court: Yes, a "bribe in the sum of \$100.00," and the second count that, "on or about October 3rd, 1946, he accepted and received \$100.00 from Tomsone, all contrary to the statute."

Mr. Sullivan: That is satisfactory. [179]

M. Neukom: That is all right.

The Court: "The first count charges that on or about October 3rd, 1946, the defendant asked for a bribe in the sum of \$100.00 from one Hubert Tomsone, and the second count charges that on or about October 18th, 1946, he received \$100.00 from Tomsone, all contrary to the statute."

Is that agreeable?

Mr. Sullivan: That is agreeable.

The Court: No. 3. Is there any objection to No. 3?

Mr. Sullivan: The objection that I have to No. 3 is that—

The Court: It is a little argumentative, I think.

Mr. Neukom: That is the language from the Fall case—the Whitney bribe case, but I will strike the second paragraph. The other part is absolutely the law.

The Court: I think that is the law.

Mr. Sullivan: The thing about that is that it seems to me it ought to be more specific—that is, asking and receiving was with the specific intent on the part of the defendant to influence his official conduct. In other words, for the purpose of influencing his official conduct. It seems that that leaves it open as to whether it might have been the purpose on the part of the giver.

The Court: I think that addition could and should be made: [180]

“For the purpose and with the intent on the part of the defendant.”

Mr. Sullivan: That is right.

The Court: Any objection?

Mr. Neukom: Adding that after “conduct”?

The Court: Yes:

“For the purpose and with the intent on the part of the defendant of influencing his official conduct.”

And then strike the last paragraph. Any objection?

Mr. Sullivan: I have no objection to the first paragraph and, while I am satisfied that the evidence in this case is going to establish the subject matter of the second paragraph, it still seems to me that that is a question of fact that should be decided by the jury and not one on which they should be instructed.

Mr. Neukom: I have no objection to taking it out.

The Court: Let the record show the last paragraph is stricken.

No. 4.

Mr. Neukom: You don't object to No. 4, do you?

Mr. Sullivan: No, I have no objection to No. 4.

The Court: No. 5.

Mr. Neukom: The next one does give your point.

Mr. Sullivan: That is right. [181]

The Court: I don't think they have to ascertain what his official duties were. That is too much.

Mr. Neukom: Well, I was just trying to—

The Court: They have to ascertain whether or not—

Mr. Neukom: He was an official—

The Court: Whether or not his official duties required or permitted him to control by order the number or quantity of shoes, orthopedic shoes. That is all there is evidence about—shoes.

Mr. Neukom: The law even goes further and it is covered by a later one. Even if he doesn't have final decision it comes within the purview of the statute and when you use the word "control"—

The Court: "have to ascertain whether or not his official duties required or permitted him to act in any way in connection with the number or quantity of shoes to be delivered by Tomsone under the contract."

Wouldn't that cover it?

Mr. Sullivan: I think it would.

Mr. Neukom: Yes, I think it would. I don't know where you are going to intersperse that.

The Court: That would be at lines 11 and 12. Instead of "next, you should ascertain from the evidence what the official duties of the defendant were \* \* \*." In other [182] words they do not have to roam the whole category.

Mr. Neukom: Let us put it this way:

"by Hubert Orthopedic Service."

The Court: By Tomsone.

Mr. Neukom: By Tomsone. That replaces the second paragraph.

The Court: I will now read the paragraph as it is amended:

"Next, you should ascertain from the evidence whether or not his official duties required or permitted him to act in any way in connection with the number or quantity of shoes to be delivered by Tomsone under the contract. Each of these elements must be found to exist beyond a reasonable doubt."

Does that cover it?

Mr. Neukom: Yes.

The Court: Any objection?

Mr. Sullivan: No objection.

The Court: Any objection to the last paragraph?

Mr. Sullivan: I have no objection to that.

The Court: Now, No. 6. Just a moment, I want to add to Instruction No. 5 before the last paragraph—I think I already read it but I want to call it to your attention:

"Each of these elements must be found to exist beyond a reasonable doubt." [183]

Mr. Sullivan: That comes after the word "contract"?

The Court: Yes. Now, No. 6. That is something of a repetition.

Mr. Sullivan: I think that is covered.

Mr. Neukom: Strike it out.

The Court: That is No. 3, the gravamen.

Mr. Neukom: Yes.

The Court: Still I think part of this is pertinent.

Mr. Neukom: You have added something to these that I did not originally have.

The Court: I think this would be all right if we strike out on line 9:

“and whether such official duties encompassed matters

\* \* \*”

That is covered by the previous instruction.

Mr. Neukom: That is right.

The Court: So it will end with the word “indictment” on line 9, and stand as is. Any objection?

Mr. Sullivan: The only objection is, the first line: “After finding the matters as instructed \* \* \*”

The Court: All right, “If you find.”

Mr. Sullivan: I think that is better.

The Court: And instead of “as instructed,” we will substitute “as covered.” “If you find the matters as covered [184] in the preceding instructions, you should next ascertain \* \* \*”

and so forth.

Mr. Sullivan: That is right. I have no objection to that.

The Court: No. 7. The defendant is not making the defense that he only had the power to make recommendations to his superiors?

Mr. Sullivan: Oh, no, your Honor.

The Court: Then why should Instruction No. 7 be included?

Mr. Neukom: I didn't know precisely what he would argue here.

Mr. Sullivan: No, we are not going to contend that he only had the power to recommend to his superiors. Our

evidence will show that he had the right to issue the prescriptions for the shoes and the prescriptions were taken into the clerk's office and an order made upon his recommendation for the prescription.

Mr. Neukom: In other words, do you concede that as an official of the hospital his capacity was such that had he accepted this bribe to influence his decision that he was a person who had the power to make such recommendation?

Mr. Sullivan: That is right.

The Court: By asking "do you concede," do you mean to [185] concede that finally?

Mr. Neukom: No, I mean as an element on instructions. I don't want Mr. Sullivan to argue that this defendant was nothing out there—that he couldn't do anything.

Mr. Sullivan: Oh, no; absolutely not.

The Court: Then this instruction has no place.

Mr. Neukom: You don't know at the beginning what you are up against.

The Court: I know that. Next is No. 8. It reads to me like a defendant's instruction.

Mr. Neukom: It is the language of the Whitney case.

The Court: I don't like the language of that instruction.

"In order for you to find the defendant guilty" nor, do I like the language that is so usually thrown in, "you will then find the defendant guilty."

All of you fellows put the cracker on the end of your instructions.

Mr. Neukom: You can change that.



Mr. Sullivan: It doesn't seem to me that is a correct statement of the law. It seems to me as I read that instruction that if this was accepted:

“with intention to cause Tomson to believe he would get more consideration”—

Mr. Neukom: You read the Whitney case and you will find that is the rule. [186]

Mr. Sullivan: Whether it was the intent in the mind of the defendant to influence his official acts.

Mr. Neukom: It is an Osage Indian Agency case. I think it is in the latter part of it.

The Court: This was an attempted bribery.

Mr. Neukom: I may have gotten it from the Daniels case. I don't remember.

The Court: I think the thought here is good in this instruction, that it isn't necessary that his action be actually influenced.

Mr. Sullivan: That is correct.

The Court: If he intended that it would be influenced.

Mr. Sullivan: That is right. That is my understanding.

Mr. Neukom: That change is agreeable to me—if he intended the other person, the giver of the bribe to think that.

The Court: It is his intent. If he intended to get the money to influence his action it doesn't make any difference whether his action was influenced. That is to say, it doesn't make any difference whether he gave him more shoes or not.

Mr. Neukom: Whether he did wrong after that or not.

The Court: Whether he gave him more shoes or didn't.

Mr. Neukom: Where I got my point was another case, Judge.

The Court: Let us see if this isn't it. Beginning on [187] line 11, starting with the words:

"It is not necessary for you to find that the defendant's design or action was actually influenced by the asking or the receipt of a gratuity, but it is a violation of the statute if the defendant intended to have his official action influenced by a gratuity."

Mr. Sullivan: Yes.

The Court: That covers the point I think you intended to have by this instruction.

Mr. Neukom: What is the last there?

The Court: "if the defendant intended to have his official action influenced by a gratuity."

Mr. Neukom: I don't think that is the law because whether he intended it or not—

The Court: But the statute says: "receiving a gratuity, asking or receiving it with the intention that his official action shall be influenced thereby."

Now, that is the bribery. Otherwise it is just plain theft, larceny.

Mr. Neukom: You will give an instruction, of course, then on circumstantial evidence as to the element of intent and that it will be ascertained from all the facts?

The Court: Yes.

Mr. Neukom: I assume that is in your general instruction— [188] tions?

The Court: Yes.

Mr. Neukom: The one I mentioned was in the case of a juror.

Mr. Sullivan: That is a different situation where you bribe a juror, because it is with the intention to influence the action of the juror.

Mr. Neukom: I think you are right.

The Court: That was a special statute.

Mr. Neukom: There are two statutes on this that read almost identically.

The Court: And one relates to jurors.

Mr. Neukom: There was one in 91-1891, I believe, and then there is this one here. I don't see any difference in them. Will you read the last part of that again?

The Court: "official action influenced by a gratuity."

Mr. Neukom: That is all right.

The Court: No. 9. I will use "or received a gratuity" instead of "the gratuity." That is an element of fact that the jury must decide, whether it was a gratuity, and when I say "the gratuity" it carries the implication that I have decided it was a gratuity.

Mr. Neukom: Yes. Since you have changed the other one I think this is a fair instruction.

The Court: Yes, I think so. [189]

Mr. Sullivan: No objection.

The Court: No. 10. I think is repetitious. I cannot see the purpose of it.

Mr. Neukom: Well, there is only one thing that he could be found guilty of—one count and not guilty on another. This is one of those compound statutes where it says, "asked, received or accepted."

The Court: Well, you should have an instruction here, and I always give one whether requested or not, that they can find him guilty on both counts or not guilty on one and guilty on the other, or not guilty on all counts, and that covers that.

Mr. Neukom: That is right.

The Court: Without wrapping it all up in a ball of wax so that the jury doesn't know what you are talking about.

Instruction No. 11. I think that is the law.

Mr. Sullivan: I have no objection to it.

The Court: No. 12.

Mr. Neukom: He submitted one on entrapment, so let us compare them. I think his No. 17, his last one. I am going to suggest that you strike, if you use nine, that you strike my second paragraph.

The Court: Well, here is an instruction I gave on entrapment:

"The defendant has raised the defense of entrap- [190] ment to counts 3 and 4. By raising such defense he does not admit the acts charged but such acts must be proved to your satisfaction beyond a reasonable doubt from the evidence in the case and under these instructions. If, however, you so find that he committed such acts as charged then you must consider whether or not he was entrapped into committing them. As to entrapment, it has been defined by the Supreme Court as follows:

" 'The first duty of the officers of the law is to prevent and not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing. It must not be their endeavor to cause or to create crime in order to punish, and it is unconscionably contrary to the public policy and to the established law of the land to punish a man for the commission of an offense the like of which he would never be guilty, either in thought or deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded and lured him to attempt to commit it.

" 'Decoys may be used to entrap criminals and to present opportunity to one intending or willing to commit a crime, but decoys are not permissible to [191] ensnare the innocent and law-abiding into the commission of crime.

When the criminal design originates not with the accused but is conceived in the minds of the Government officers and the accused is, by persuasion, deceitful representation or inducement, lured into the commission of a criminal act the Government is estopped from sound public policy in the prosecution thereof.'

"So that if you should find that there was such entrapment then the defendant is entitled to your verdict of not guilty even though you find beyond a reasonable doubt that he did the acts alleged."

Mr. Sullivan: That is satisfactory.

The Court: Any objection?

Mr. Sullivan: There is no objection to that.

The Court: I think the Government's Instruction No. 12 is faulty. In the first paragraph it says:

"You are instructed that the very heart of the doctrine of entrapment is that the Government itself must have brought about the crime."

Then if you will read my second paragraph I think you will find it is a more fair interpretation of the law of entrapment, because that law is well established.

Mr. Neukom: And it is well established in innumerable [192] cases that the Government has a right to set decoys; that it is their duty to test a person who has originated the criminal intent and give him an opportunity to perpetrate the crime.

The Court: It is pretty hard to persuade me as against the Supreme Court, Mr. Neukom.

Mr. Neukom: Why can't you add to that:

"But if the criminal intent originated in the mind of the accused and he is merely afforded the opportunity of doing what he intended to do then it is not entrapment."

Mr. Sullivan: I think the court's instruction covers that.

Mr. Neukom: The instruction does not cover it. That is a discussion and not an instruction. That is a discussion of a point of law.

The Court: It has all the elements of entrapment.

Mr. Neukom: I don't think they are fairly stated from an instruction point of view. If you just add one sentence, the converse of that—the converse of what you just read—

The Court: Conversely, "If the criminal design originates in the mind of the accused then there is no entrapment."

Mr. Sullivan: I have no objection.

The Court: I will add that before saying, "So if you [193] find there was such entrapment—" and so forth.

Mr. Neukom: That is satisfactory. And that eliminates your 17, doesn't it?

Mr. Sullivan: Yes, that eliminates 17 from mine, absolutely.

The Court: All right, the defendant's requested instructions.

Mr. Neukom: The first one is the indictment. I assume that is covered.

The Court: I cover that in my general instructions.

Mr. Neukom: And No. 2 I am confident is covered.

The Court: I will give No. 4.

Mr. Neukom: I have no objection to it.



The Court: I will give No. 4.

Mr. Neukom: Except that is going to give rise to the theory of an accomplice and I haven't an instruction on it.

Mr. Sullivan: Frankly, that may not be necessary to even give, Judge. When I prepared these I did not know how the evidence would show up here.

The Court: Do you want No. 4 or not?

Mr. Sullivan: I don't think it is necessary to give it.

The Court: All right.

Mr. Neukom: I have no objection to No. 5.

Mr. Sullivan: Six is in your general instructions. [194]

The Court: Yes, I will take that out. I have that but I want to check and be sure. Experts.

Mr. Sullivan: Well, I thought that might have some bearing.

The Court: Are you going to have experts?

Mr. Sullivan: Well, I think that there is some question here as to whether or not—I mean under the evidence in this case whether he acted honestly in his opinion as a doctor and so forth.

Mr. Neukom: I can't see that unless there is some unusual or different evidence coming in this case.

The Court: Unless you have experts that you are going to put on the stand I can see no need for this instruction in the present state of the evidence.

Mr. Sullivan: Then suppose we hold it in abeyance and see whether or not—

The Court: Do you expect to put experts on?

Mr. Sullivan: I have some doctors subpoenaed.

The Court: Character witnesses?

Mr. Sullivan: Well, not just alone for character but in connection with their opinion regarding his diagnoses.

Mr. Neukom: I don't even see where that is material in the case. There has been no evidence by the Government to contest his—

The Court: Under my instructions what difference would [195] it make?

Mr. Sullivan: All right.

The Court: Whether his diagnoses were correct or not. It doesn't make any difference whether he did give the fellow the shoes who was entitled to them if he intended to be influenced by taking money.

Mr. Sullivan: That would be true, Judge, except there is evidence here in this case now by Tomsone that after Dr. Gage came to work there, between the time that he came to work there and the second occasion when Tomsone saw him that his orders had decreased and that between that time and the 3rd of October there had been a further decrease in his orders.

Now, then, it seems to me that it would become material from the defendant's standpoint to show that.

The Court: Yes.

Mr. Sullivan: That any refusals that he made were refusals that were honest and his honest opinion as an orthopedic surgeon.

The Court: Under those circumstances I think it would be admissible.

Mr. Neukom: You will give No. 7?

The Court: Yes.

Mr. Neukom: 8 is covered, I think.

The Court: Yes; and 9 is covered.

Mr. Sullivan: 10 is. [196]

Mr. Neukom: That is a correct statement but I am sure it is covered.

The Court: Yes, I am sure it is.

Mr. Sullivan: I think it is.

The Court: And 11 is a re-statement of 10.

Mr. Sullivan: Just about.

The Court: 12. I have covered intent.

Mr. Sullivan: Yes, I think you have covered intent very well in the other instructions and I think as far as my next instruction—

Mr. Neukom: 13.

Mr. Sullivan: —you have adequately covered that.

Mr. Neukom: 13?

Mr. Sullivan: Yes. I don't know whether you got 14 there in your general instructions or not.

Mr. Neukom: I think that works both ways. If we are going to give that one I think we ought to give the 1861 subdivision 15 of the Code of Civil Procedures, that official conduct is presumed to be legal and proper. I have that with respect to your illusion as to the contract here. I think that works both ways in this case. It is one of the rebuttable presumptions that official duty has been regularly performed. I think it confuses the whole thing—all of this does.

The Court: Yes, I think so. This is just a presumption [197] of innocence.

Mr. Sullivan: Yes, that is.

The Court: That is all this is, it is just an elaboration upon the doctrine of presumption of innocence.

Mr. Sullivan: That is exactly what it is.

The Court: I think it might become confusing because the defendant is presumed to be innocent, not only as to motives, but as to acts—to everything, and this merely directs attention to his motive.

Mr. Sullivan: All right.

The Court: I will decline it.

15 and 16. 16 is again another presumption of innocence and 17 is your entrapment.

Mr. Sullivan: That is right.

The Court: O.K.

Mr. Neukom: Now, I do not have an instruction here on an accomplice. I do not believe that the evidence shows Tomsone is an accomplice but I think the law gives us a right to ask for that instruction.

The Court: He has not asked for it.

Mr. Sullivan: I did not ask for it.

The Court: If you want it, I have one here.

Mr. Neukom: You must find preliminarily that Tomsone is an accomplice.

The Court: Yes. [198]

Mr. Neukom: But I think before the instruction should be given—I think as the evidence stands now there is no evidence—

The Court: The instruction here is:

“The testimony of an accomplice is not to be judged by you by the same standards as that of other witnesses, and the witnesses Harold Garrison is an accomplice.”

Mr. Neukom: He had co-complicity probably—had criminal intent and probably gave State’s evidence, didn’t he?

The Court: Yes.

Mr. Neukom: There is no evidence here to indicate that Tomsone—

The Court: Was an accomplice.

Mr. Neukom: So I do not think the instruction is proper.

The Court: All right, the instructions will be given as indicated.

(The following proceedings were had in open court in the presence of the jury:)

The Court: The usual stipulation, gentlemen?

Mr. Sullivan: Yes, your Honor.

Mr. Neukom: Yes.

The Court: The defendant, I believe, was on the stand.

Mr. Sullivan: Yes, your Honor. Will you resume the [199] stand?

THEODORE S. GAGE,

called as a witness in his own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Sullivan:

Q. Now, if I remember correctly, Doctor, at the time of the adjournment yesterday afternoon we were—I had either just asked you or you just told us who your immediate superior was at the Veterans Administration in Sawtelle. Had you testified as to your immediate superior?

A. Yes, I had.

Q. That was Dr. Long?

A. That was Dr. Long and Colonel Strachan.

Q. Now, in connection with your work at the hospital there in Sawtelle, did certain patients or veterans come to you for examination and treatment in relation to their feet? A. Yes, they did.

Q. And in connection with your work there did it become necessary for you from time to time to order specially built orthopedic or corrective shoes?

A. That is correct, it did.

(Testimony of Theodore S. Gage)

Q. And what was your procedure in relation to ordering shoes for a veteran when you deemed it necessary to do so? [200]

A. First the patient was examined thoroughly and his complaints written in the folders supplied—

The Court: Didn't we go through that yesterday?

Mr. Sullivan: I think we did.

The Court: I think we went through that yesterday. He put it on his outgoing file on the desk and it was taken by the clerk.

Mr. Neukom: The subject matter that you were on was about the contract. You were about to get to his inspection of the contract when we adjourned.

Mr. Sullivan: All right.

Q. You did learn, I believe you testified, that there was a contract in existence between Mr. Hubert Tomsone and the Veterans Administration there for the purpose of furnishing these shoes? A. That is correct, I did.

Q. And when it became necessary for you to write a prescription for shoes was an order given to Hubert Tomsone for those shoes?

A. It was given but not by me.

Q. How was the order written up?

A. Well, the order was given in through the process of being taken off of the patient's record where the prescription had originally been written and had been written in a code manner to conform to the code numbers on the contract. [201] Then the clerk in the orthopedic clerical office would write up the initial purchase order from that particular prescription in the patient's chart.



(Testimony of Theodore S. Gage)

Q. Now, then, did you come to know, after you went to work there, did you come to know Mr. Hubert Tomsone? A. Yes.

Q. Now, when did you first meet Mr. Tomsone?

A. My first meeting with Mr. Tomsone was some time early in September, shortly after Labor Day, I believe.

Q. And between the time that you first went to work there and the time that you first met Mr. Tomsone had you had any complaints from any of the veterans in relation to the shoes or modified shoes that had been made by Mr. Tomsone?

A. Yes, I had a number of them.

Q. Now, on the occasion of your first meeting Mr. Tomsone did you have any conversation with him in relation to the type of work that he was doing?

A. Yes, I did.

Q. Now, just relate to the jury what was said on that occasion by yourself or by Mr. Tomsone—incidentally, was there anyone else present besides the two of you?

A. Yes. At that particular meeting there was someone else present.

Q. Who else was present?

A. Dr. Mosay (?). [202]

Q. Just relate what was said.

A. May I go back two weeks prior to that meeting?

The Court: I think your counsel had better direct the testimony.

The Witness: At the first meeting with Mr. Tomsone I asked that he come into my office, that I had something I wanted to talk to him about.

The Court: Is this the meeting that you identified now with Dr. somebody else present?

The Witness: Yes, sir.

(Testimony of Theodore S. Gage)

The Court: All right.

The Witness: At that meeting Dr. Mosay was present in my office. Mr. Tomsone entered my office in the presence of Dr. Mosay and I told him that during the weeks that he had been on his vacation—that this was the first time that I had met him and I was a new man at the Facility; that things were new to me and that I wanted to make his acquaintance and wanted him to know me but that during the weeks that he was away on his vacation I had had a number of complaints from veterans regarding improper fits in shoes and improper modifications of their own shoes, and I asked him about it, and one word led to another. He got quite hot about it, and I got quite hot, and the conversation developed from an ordinary conversation into an argument, during which time I don't believe either one of us acted much like a gentleman. [203] We used language that was perhaps not proper and it was at that particular occasion when I asked Mr. Tomsone to refrain from calling me "Gage", that my name was Dr. Gage, and it was also at that time that he said, "My name is Mr. Tomsone. Call me Mr. Tomsone."

Well, the argument lasted perhaps 10 or 15 minutes and I told him during that time that since I was the new man here there were certain things that I was going to see were enforced and certain stipulations in the contract that he held that called for certain definite specifications in shoes that had to be lived up to.

I also told him that when a prescription was written by a doctor that he was not to substitute or to change that prescription in any way according to the way he felt that it should be—that that was the doctor's prerogative to do the prescribing and that was the way I expected him to turn out the shoes.

(Testimony of Theodore S. Gage)

His argument was that the contract did not have certain stipulations or certain items in the contract that met with some of the prescriptions, which was true. The contract was not a properly written orthopedic contract.

Q. By Mr. Sullivan: And did you tell him—

Mr. Neukom: Wait just a moment, your Honor. I object to the conclusion of this witness as to the contract. I think the jury should be instructed to disregard it. [204]

The Court: The jury is instructed to disregard the last statement, that it was not a properly written contract, orthopedic contract. That may be stricken from the record.

Q. By Mr. Sullivan: Go on with your conversation with Mr. Tomsone.

A. Well, that was the substance of that particular first meeting and argument with Mr. Tomsone.

Q. Now, when did you next see Mr. Tomsone?

A. I saw Mr. Tomsone several days later in the corridor outside of my office.

Q. Did you have a conversation with him at that time?

A. Yes, I did. I went up to him and I said, "Tom, I am sorry that I acted in the manner in which I did. It wasn't very gentlemanly-like. I suppose I lost my head," and he said, "Well, I suppose I lost my head."

Then the conversation out in the corridor continued for a few minutes longer, at which time he said to me, "How come my business is dropping off? Why are you not writing more prescriptions for shoes?"

I said I wasn't aware that it was dropping off; that there were certain types of cases that were coming in that the need for special orthopedic shoes did not exist and they had been received—they previously had received them and that I was just denying them on the basis that no

(Testimony of Theodore S. Gage)

medical indication existed for their need; that an ordinary pair of [205] shoes would have done just as well as one of the expensive pairs of shoes that Mr. Tomsone made.

Q. Now, did you have at your disposal there at the Veterans Administration and for your guidance the contract between the Veterans Administration and Mr. Tomsone? A. Yes, I did.

Q. And did you have occasion from time to time while you were employed as an orthopedic surgeon at the Veterans Administration there to inspect the work that had been made by Mr. Tomsone under prescriptions that had been issued by the orthopedic department?

A. Yes, I did.

Q. And did you have occasion to ascertain whether or not the work which was done by Mr. Tomsone met the specifications contained in the contract which he had with the Government?

Mr. Neukom: Just a moment. I object to that as being too indefinite and too general and calling for the conclusion of the witness on a matter on which we are not able to respond unless we know what the specific item is in mind.

The Court: Sustained.

Q. By Mr. Sullivan: Well, did you ever have occasion to inspect any orthopedic shoes that were made by Mr. Tomsone under a prescription issued by the Veterans Administration in Sawtelle? [206] A. Yes, I did.

Q. And under the contract which existed between Mr. Tomsone and the Veterans Administration did the orthopedic shoes have to meet certain specifications?

A. Yes, they did.

(Testimony of Theodore S. Gage)

Q. Now, did you have occasion to determine upon your examination of any orthopedic shoes made by Mr. Tomsone whether or not those shoes met the specifications contained in the contract with the Veterans Administration?

Mr. Neukom: I raise the same objection—the same objections is proper but I am going to withdraw it in the interests of time, your Honor.

The Witness: Yes, I had the occasion to inspect them and they did not meet the specifications.

Q. By Mr. Sullivan: Can you tell the jury wherein they failed to meet the specifications?

A. The contract called for prime leather and the shoes that I saw were not of prime leather. The specifications of the contract called for certain steel shanks in each shoe and many, many shoes did not have steel shanks.

The contract called for hand-sewed shoes and there was machine-sewed shoes. Those that were hand-sewed were haphazardly sewn, so that the seam between the welt and the upper part of the shoe many times broke through upon the initial first couple of wearings of the shoe by the patient. [207]

Q. Did you from time to time have occasion to call those matters to the attention of Mr. Tomsone?

A. I did.

Q. Now, were you acquainted with Mr. Howe, who was also connected with the Veterans Administration there?

A. I was.

Q. And did you ever have occasion to discuss the matter of the manner in which Mr. Tomsone was fulfilling this contract with Mr. Howe?

A. I did, sir.

Q. Without going into the conversation itself, did you ever call to the attention of Mr. Howe the fact that Mr.



(Testimony of Theodore S. Gage)

Tomsone was not making his shoes according to the specifications contained in the contract?

A. I did on two occasions.

Q. Now, did you ever have any discussion with Mr. Howe in relation to the orthopedic contract which existed between Mr. Tomsone and the Veterans Administration?

A. I did.

Q. And do you know approximately when that was, Doctor?

A. Sometime in September—perhaps the early part of September. I do not remember the exact dates. I talked to him on the telephone on those two occasions that I mentioned.

Q. Just relate to the jury the conversation that took [208] place between yourself and Mr. Howe on that occasion.

A. I called Mr. Howe on those two occasions and called his attention to the specifications of the contract and some of the complaints that had been coming in from the Veterans that violated the definite specifications in the contract, and I said to him that my observation in using the contract that was at my disposal in the office, that the contract did not seem to be a properly drawn-up orthopedic contract; that there were several basic orthopedic corrections to shoes that were not on the contract whatsoever that an orthopedic man, an experienced orthopedic man would have put on a contract. Mr. Howe said that he knew that the contract lacked many of those refinements; that it had been made up by a civilian and not by a doctor. And on one of those occasions, I don't remember which one, the first or second, he asked me if I had the time would I sit down and re-write the contract—as I thought



(Testimony of Theodore S. Gage)

an orthopedic contract should be written, and submit it to him and he would go over it, and if he found that this man, Mr. Tomsone, was not living up to the specifications he would invoke the first clause of the contract, cancellation clause of 30 days and then advertise, open up for new bids on the contract.

Q. Well, now, after having had that conversation with Mr. Howe, did you have any conversation with Mr. Tomsone in relation to your re-writing the contract—I mean, with [209] Mr. Tomsone?

A. Yes. There were a number of occasions when I told him that the contract was not proper and that I had been asked to re-write it.

Q. Did you tell him who had asked you to re-write it?

A. Not on those occasions.

The Court: We will take a short recess now for the purpose of changing reporters.

(Short recess.) [210]

The Court: Proceed.

By Mr. Sullivan:

Q. Now, Dr. Gage, did you ever have a conversation with Mr. Tomsone in which you stated to him, or asked him in substance and effect, how was business, and he replied, "Business is good," to which you replied, "I don't think so, I know there has to be another change here and there have been a lot of veterans getting shoes who are not entitled to them"? A. No, sir; I did not.

Q. Did you ever have a conversation with Mr. Tomsone in which you told him, in substance and effect, "I want to talk to you about something. I have been rejected by

(Testimony of Theodore S. Gage)

the medical board twice and I am not here for my health. I have to make some money somehow”?

A. I did not; at no time.

Q. Did you ever have a conversation with Mr. Tomsone in which you told him, in substance and effect, that if he played ball with you that you could see that he made a lot of money, or had a lot more business?

A. No, I never made such a conversation or had such a conversation with Mr. Tomsone.

Q. Did you ever have a conversation with Mr. Tomsone in which you told him, in substance and effect, that he was selfish, that there were a lot of people who made money on the outside and a lot of physicians who got money or other [211] monthly presents from persons or companies that they ordered things from?

A. I had no such conversation with him.

Q. Other than discussing with Mr. Howe at the Veterans Administration there the manner in which Mr. Tomsone was fulfilling this contract, did you make any complaint to any other person out there about it?

A. Yes, I did.

Q. Who else did you complain to?

A. I complained to my superior, Dr. Long, on a number of occasions.

Q. Did you complain to any of the other doctors around there about him?

A. Yes, I was quite hot about it and mentioned it to my colleagues out there. Most of them had heard me say that.

Q. Can you tell us who some of the other doctors were that you made such complaints to?

A. My colleagues there, Dr. Levine, Dr. Kuhn, Dr. Strachan, Dr. John Nie—those who were closely associated

(Testimony of Theodore S. Gage)

with me in the department and those that were in the outpatient service had heard me on many occasions.

Q. Now was there any occasion when you gave to Mr. Tomsone your home address?

A. Yes, there was.

Mr. Sullivan: Mr. Clerk, I wonder if I might have that [212] exhibit, please.

(The document referred to was passed to counsel.)

By Mr. Sullivan:

Q. Referring, Dr. Gage, to Government's Exhibit No. 6, is that exhibit in your handwriting?

A. Yes, it is.

Q. Does that exhibit contain your address in Santa Monica? A. That is correct.

Q. To whom did you give this written memorandum, Government's Exhibit No. 6, containing your address?

A. To Mr. Tomsone.

Q. Did you have some conversation with him at that time in relation to giving him your address?

A. Yes, I did.

Q. Just relate to the jury what occurred between yourself and Mr. Tomsone at that time, what was said by each of you to the other.

A. On that particular instance, it followed shortly after that little spat that Mr. Tomsone had with me and shortly after the occasion when I apologized to him in the hall. He came to me and tried to be friendly, and in a conversation on this occasion he said, "Well, you look like you could enjoy some good food," and I said, "Yes, I do."

He said, "How would you like a good spaghetti dinner?" [213]

(Testimony of Theodore S. Gage)

I said, "It sounds all right. Who do you know makes good spaghetti in this town?"

He said, "I would like to take you and Mrs. Gage out to dinner one night."

I said, "That is all right with me."

He said, "Where do you live?" And I wrote that particular note with my address and phone number and told him that any time he decided if he wanted to get in touch with me at the hospital or at my home he could do so.

Q. Well, now, on the occasion when you gave him that slip of paper with your address on it, did you have any conversation with him in substance and effect in which you told him to come down to your apartment sometime and talk to you about this matter of both of you making some money?

A. No, sir, I never had any such conversation.

Q. Did you ever have any conversation with him in which he told you in substance—in which you told him in substance and effect, that he ought to give this contract up and then you would try and get the contract under some fictitious name and use him as a silent partner, that you would do all the work on the inside and he could make the shoes on the outside and you could both make a lot of money?

A. I did not have any such conversation.

Q. Did you ever see Mr. Tomson at your home?

A. No, I did not. He was never at my home. [214]

Q. Now you say that you gave him this slip of paper with your address on sometime shortly after you had had this first argument with him, is that correct?

A. That is correct.

(Testimony of Theodore S. Gage)

Q. And would that be sometime in the early part of September, about the middle of September?

A. Approximately thereabouts. It would be between the 10th and the 15th perhaps.

Q. Did you ever have occasion to go to Mr. Tomsons's place of business where he made his shoes?

A. Yes, I went there on two occasions.

Q. Do you know approximately when that was?

A. It was in the latter part of September. I had taken four days leave off of my annual leave from the hospital to take care of some of my own personal business, and I believe it began on either the 24th or 25th of September and ran until Friday morning the 29th. I believe those are the dates.

On the 27th I was downtown and I was in the vicinity of Mr. Tomsons's shop. I stopped in there to see what type of a shop he had and just how he was turning out his products. He was not there at the time. I waited a few moments and he came in, and I remained there approximately an hour, during which time he showed me various types of arch supports, various types of shoes and corrections that he was making.

Q. Did you ever go back to his place of business after [215] that? A. Yes, I did.

Q. When did you go back there?

A. I went back the next day.

Q. When you went back the next day did anyone go with you?

A. Mrs. Gage accompanied me the next day.



(Testimony of Theodore S. Gage)

Q. When Mrs. Gage accompanied you the next day what, if anything, did you do there at Mr. Tomsons's place?

A. Well, on the day previous while I was there I mentioned to Mr. Tomsons that Mrs. Gage had some very bad arthritic feet and she was somewhat cramped up in walking, that I had tried most everything and I had an idea on correcting her shoes, and asked him if he would do it under my supervision. And he said, "Yes. Bring her down."

So the next day I brought her in. During that visit I made some plaster molds of her feet and showed him how I wanted her shoes, the ones she wore in, modified. And under my supervision Mr. Tomsons made the correction and we left his shop.

Q. How long were you there on each occasion?

A. About an hour and a half.

Q. Were her shoes modified while you were there at that time?      A. Yes. [216]

Q. On that occasion did you personally supervise the modification of her shoes in his shop?      A. I did.

Q. Now that was, you say, in September, the latter part of September?

A. The latter part of September. It was the day, just the last day of my 4-day leave from the hospital. I returned to work the next day.

Q. Was that the first time that Mr. Tomsons had ever met Mrs. Gage?

A. That was the first time he had ever met Mrs. Gage.

Q. Now was there ever any occasion when Mr. Tomsons called you and wanted you to go to lunch with him?      A. Yes, there was.



(Testimony of Theodore S. Gage)

Q. Do you recall approximately when that was?

A. That was in the early part of October, I imagine the 2nd or 3rd, somewhere thereabouts.

Q. How did he communicate with you, by telephone?

A. He called me by telephone.

Q. Incidentally, at the Veterans Administration out there in Sawtelle do you have your own office where you examine your patients?

A. I have my own office there.

Q. And do you have a telephone in your own office there? [217]

A. No, I have no telephone in my own office.

Q. When you receive any calls there by phone, where do you have to take those calls?

A. Well, I have to run down to the end of the hall to either Dr. Long's section office or to the orthopedic clerical office.

Q. In the orthopedic clerical office, how many employees are in that office?

A. Oh, there is always two or three in that office.

Q. Do you recall on the occasion when you received the phone call from Mr. Tomsone wherein you were invited to go to lunch with him, on what phone did you take that call?

A. One of the girls of the orthopedic clerical office called me that there was a telephone call in her office, and I went to her office.

Q. On that occasion what was said by Mr. Tomsone over the telephone, and what did you tell him?

A. He asked me if I would have lunch with him that afternoon, that he wanted to talk to me, and I said, "Yes, I am just about ready to go to lunch. Where are you at?"

(Testimony of Theodore S. Gage)

He said, "I am not far from the place."

I said, "Where will I meet you?"

He said, "Meet me at Wilshire and Sawtelle. I will be parked out in front of the place."

I said, "All right. I will meet you there." [218]

Q. Was anything said about the time that you were to meet him?

A. The telephone call was approximately a couple of minutes before 12:00, and my lunch hour began at 12:00, and I told him I was just about ready to go to lunch and I would meet him there in a few minutes.

Q. Did Mr. Tomsone tell you at that time over the telephone that he couldn't meet you at your home?

A. No, he did not.

Q. Did you meet him at that intersection in response to that phone call?

A. Yes. I walked out to the intersection of Wilshire and Sawtelle and Mr. Tomsone was sitting in the car.

Q. That, as I understand your testimony, was sometime the early part of October?      A. That is correct.

Q. Now prior to that occasion, had there ever been any conversation between yourself and Mr. Tomsone regarding money?      A. There had not.

Q. When you met, where if any place did you and Mr. Tomsone go?      A. It was always in my office or—

Q. I mean, on this occasion when you met him in the car.

A. Well, I got in his car and he started in the direction of [219] Westwood Village, and we had just about reached Sepulveda and Wilshire Boulevard and he said, "Where would you like to have lunch?"

I said, "It makes no difference."

(Testimony of Theodore S. Gage)

"Well," he said, "you live out this way and you eat lunch out here often. Where would you want to go?"

I said, "Well, there is nothing in Westwood Village that is nice. Let's go to the Mayfair."

And he turned the car around and we proceeded to the Mayfair Restaurant in Santa Monica.

Q. Did you have some conversation with him while you were at the Mayfair?           A. Yes.

Q. Incidentally, did you both occupy, that is, the two of you occupy, a table alone?

A. Yes, we occupied a table alone.

Q. Just relate to the jury what was said by Mr. Tomsone and by you while you were having lunch there.

A. Mr. Tomsone said to me, "I don't understand why you are cutting down my business."

I said, "There is nothing personal. I am not cutting down your business intentionally."

He said, "You are a smart fellow. You can make some money. How much do you make?"

I said, "It is a matter of record. I am a public ser- [220] vant. You can find that out."

He said, "What do you make?"

I said, "I make about \$100 a week." That was the entire conversation.

Q. Did he then take you back to the hospital?

A. Yes, we left. I only had an hour for lunch and by the time we got there it was 12:30 and on Government time if you are one minute off you are late.

Q. Then did you thereafter have any conversation with Mr. Tomsone in relation to money?

A. No, sir.

Q. Never at any time?           A. Never at any time.

(Testimony of Theodore S. Gage)

Q. Did he ever at any time say anything to you about giving you a check?      A. Yes.

Q. When was that, Doctor?

A. That was somewhere towards the middle of October. He came into my office and bent over my desk and said, "Look, I want to give you some money. I will give you a check."

I said, "What for?"

"Well," he said, "you can use some money."

I said, "Look, don't be foolish."

He said, "Take a check," and he threw his checkbook on the desk, and I walked out of the office there on some other [221] business and that ended that particular incident.

Q. Had you ever said anything about either one of those incidents to anybody out at the Veterans Administration out there?

A. I had made complaints to Dr. Long and shortly before that I had a conversation with Mr. Chapman along these lines.

Q. Which one did you talk to first, Dr. Long or Mr. Chapman?      A. I talked to Dr. Long.

Q. Do you know approximately when you first talked to Dr. Long about that?

A. Well, it was sometime in September, shortly after the argument that I had with Mr. Tomsone. I told Dr. Long that I wasn't satisfied with his work and that he was making sort of overtures and I couldn't understand what it was, and there wasn't anything more.

(Testimony of Theodore S. Gage)

Q. When did you talk to Mr. Chapman about it, approximately?

A. Approximately the 5th of October. I saw Mr. Chapman in his office.

Q. What was the occasion of your seeing Mr. Chapman?

A. Relative to my resignation from the Facility.

Q. Had you come to any decision with respect to whether you wanted to stay on there or intended to resign prior to the time you talked to Mr. Chapman? [222]

A. I had on a number of occasions shortly after I began work there found I wasn't very happy and had threatened to resign a number of times, but didn't actually go through the official channels until somewhere towards the end of September when I asked Mr. Nie, the medical administrative office, or rather one of the girls in his office, to draw up my resignation papers.

Q. Did you cause your resignation papers to be drawn up?

A. Yes.

Mr. Neukom: I object to its materiality, unless it is for the purpose of showing that he wasn't employed at the time in question.

Mr. Sullivan: I don't intend to show he wasn't employed at the time in question.

Mr. Neukom: Then I still object, your Honor. It is utterly immaterial whether he was going to resign or not resign or what his intent was as to that. That doesn't settle any of the issues in this case.

The Court: Overruled.

Mr. Sullivan: May this be marked Defendant's exhibit for identification?

The Court: That is the first one?



(Testimony of Theodore S. Gage)

Mr. Sullivan: Yes.

The Court: Defendant's Exhibit A. [223]

(The document referred to was marked Defendant's Exhibit A for identification.)

By Mr. Sullivan:

Q. Now, Dr. Gage, I show you Defendant's Exhibit A, which purports to be a request for resignation. Do you recognize that document? A. Yes, I do, sir.

Q. Can you tell the jury what that is?

A. Well, it is a personnel action request for resignation of one Theodore S. Gage, the date of the request October 2, 1946, and the effective desired date of resignation October 15th.

Q. Did you procure that exhibit, Defendant's Exhibit A, on or about October 2, 1946?

A. I made the request, I think it was about the 30th of September, somewhere thereabouts, and these papers were handed to me on that particular date, on October 2nd.

Q. Now at the time that you received this instrument, Defendant's Exhibit A, did you have any conversation with Mr. Arthur Nie at the Veterans Administration?

A. Yes, I did.

Q. Do you know in what capacity Mr. Arthur Nie was employed there?

A. Mr. Arthur Nie was the medical administrative officer, a new post that acted as a liaison between the adminis- [224] tration and the professional side of the outpatient department.

Q. When you procured that document, was it your intention to tender your resignation as an orthopedic surgeon at the Veterans Administration? A. Yes.



(Testimony of Theodore S. Gage)

Q. When did you have some discussion with Mr. Nie in relation to that?

A. I think it was the day he handed me these papers on October 2nd, and Mr. Nie said to me, "Personally," he said, "Doctor, I hate to see you leave. You are doing a good job. You have been working hard here and I know that you have been dissatisfied. Of course you might be a little impatient, impetuous, but," he said, "you are doing a good job and personally I would like you to reconsider and stay. But I would suggest, as a suggestion, since Mr. Chapman, the manager, has an open-door policy, why not go over and talk with him and air all your complaints to him. Tell him the things that are bothering you and your reasons why you want to resign."

Q. Following that conversation with Mr. Nie did you have some discussion with Mr. Chapman?

A. I did.

Q. When did you talk the matter over with Mr. Chapman? A. October 5, 1946.

Q. Just relate to the jury what was said by yourself [225] and by Mr. Chapman on that occasion.

A. I went to Mr. Chapman's office, which is in the regional office on Sepulveda away from our particular office—we are in the hospital proper; the regional office was on the other side of Sepulveda—I went to Mr. Chapman's office and took with me a lot of papers, took my resignation and a copy of my reasons for resigning, the reasons that I had to put on the back of this form in order to make this official.

I spoke to Mr. Chapman. He granted me the interview and was very generous with his time. I explained to him that there was nothing personal in any of my actions, that

## (Testimony of Theodore S. Gage)

I was dissatisfied with the way things were going and the type of medicine that I had to practice, the complaints that I was getting and the dry-rot that seemed to exist in that particular outpatient department.

I mentioned to him that I had gone to Dr. Long on a number of occasions with these complaints about the shoes, about artificial limbs, artificial legs, and Dr. Long shrugged his shoulders and didn't seem to be interested or do much about it.

I further elaborated on my four reasons for wanting to resign and leave the position. At the end of the conversation, or during the conversation, Mr. Chapman said to me—I am quoting; I don't know whether it had any significance at that time but he brought out—"I only hope that these [226] things that you tell me are not a carry-over from a scandal that we had here some years ago in which a doctor committed suicide." I don't know what that referred to and it was passed by.

Then I said to him, in conclusion, "Well, Mr. Chapman, these are my intentions. I wish to resign. What do you advise me to do?"

He said to me, "Well, I can't advise you if your mind is made up definitely, but in order to give me a chance to look into some of these things why don't you hold up your resignation until you hear from me?"

Q. Did you tell him what you would do in relation to your resignation after he requested you to hold it up?

A. I told him then that I would do that.

Q. That you would hold it up?

A. That I would hold it up.

(Testimony of Theodore S. Gage)

Q. Did you thereafter file your written request for resignation or did you hold it?

A. Well, I came back from the interview with Mr. Chapman and came into Mr. Arthur Nie's office and told him that I had had this meeting with Mr. Chapman and that I was very favorably impressed, that for the first time somebody seemed to be interested, and that on his recommendation that I hold up my resignation until he had a chance to investigate some of these complaints, that I was holding up my resignation. [227]

Q. Now, then, did you see Mr. Tomsone again after this occasion when you had lunch with him at the Mayfair, which was in the early part of October? A. Yes.

Q. When did you next see him after that, do you recall?

A. Well, I don't recall the exact date but I had occasion in the general routine of my work there on the days that he came into the clinic on Tuesdays and Fridays to see him after that meeting.

Q. Well, now, going back for just a moment to this occasion when you went to the Mayfair with Mr. Tomsone, did you tell Mr. Tomsone on that occasion, in substance and effect, that you wanted to have \$100 out of this contract? A. I did not.

Q. And did he on that occasion ask you, "What do you mean, \$100 a month?" And you said, "Hell, no, \$100 a week." A. There was no such conversation.

Q. Did you tell Mr. Tomsone on that occasion that you were going to resign on the 15th of October but that you would not resign if he would pay you \$100 a week out of the money he receiver on this contract?

A. I did not.

(Testimony of Theodore S. Gage)

Q. Didn't you tell him on that occasion, or say to him in substance and effect, "From now on you will see a difference in the orders in shoes starting today"? [228]

A. I did not say that.

Q. Now did you, the Friday following the occasion that you had lunch with him at the Mayfair, have a conversation with Mr. Tomsone in which he told you that he hadn't brought any money and you said, "Well, I will be willing to wait for it"?

A. No, I did not have that conversation. I believe that is the date when he threw his checkbook down and asked me if I would take a check, and I said no.

Q. On that occasion did Mr. Tomsone say to you, in substance and effect, that he had been advised to pay you by check and you told him, "No, it has to be strictly cash"?

A. No, sir; there was no such conversation.

Q. Did you tell him on that occasion that you were going to be off work for a few days, that is, on Friday following the time you went to the Mayfair for lunch?

A. No.

Q. Did you take any time off from your days at work between the time that you had had lunch with him at the Mayfair, in the early part of October, and the time your services were terminated about the 18th of October?

A. No, I took no time off.

Q. You were there every day, that is, every working day that you were required to be there?

A. That is correct. [229]

Q. Do you recall the 18th of October 1946?

A. Yes, I do.

Q. Were you at work on that day, Doctor?

A. I was at work that day.

(Testimony of Theodore S. Gage)

Q. Did you go to lunch at the usual hour?

A. I left at the usual hour; yes.

Q. That is at noon? A. At noon.

Q. Where did you go?

A. I had an appointment with Dr. Frank Otto, who was then the president of the California Medical Board of Examiners. I had an appointment to meet him at his office at 12:30 on October 18, 1946.

Q. Now without relating any conversation that took place between you and that doctor, just generally what was the purpose of your appointment with him on that day?

A. To discuss the taking of the California examination again.

Q. Were you still desirous of taking the California State Board examination? A. Yes, I was.

Q. That is, to permit you to practice medicine and surgery in the state of California?

A. That is correct.

Q. Incidentally, in connection with your work at the [230] Veterans Administration in Sawtelle, it is necessary or is it a requirement that you be admitted to practice medicine or surgery in the state of California in order to be employed there as a physician or surgeon?

A. No, it is not required. The Government recognizes a license from any of the states in the Union in its service.

Q. But your activities are confined strictly to the Veterans Administration unless you are licensed to practice in the state of California?

A. That is correct. The activities are definitely confined.

Q. Did you keep your appointment then there with—who did you say it was? A. Dr. Frank Otto.



(Testimony of Theodore S. Gage)

Q. With Dr. Frank Otto on that day?

A. I did.

Q. What time did you return to the Veterans Administration?

A. It must have been sometime after 2:00 o'clock, probably between 2:15 and 2:30.

Q. Had you made any prior arrangements to meet Mr. Tomsone at the Veterans Administration that afternoon?

A. No, I had not.

Q. Had you made any prior arrangements to meet him any place that day? [231]

A. No, I had not.

Q. When you returned from your appointment, did you see Mr. Tomsone at the Veterans Administration at any time that afternoon?

A. Well, I came to my office, of course I was late, I should only have taken from 12:00 to 1:00, so I was in a hurry. I got back into my office and changed from my street coat to my white gown, and Dr. Strachan came into my office and said, "Hubert is looking for you."

I said, "What does he want?"

He said, "I don't know. He has been looking for you all afternoon."

I said, "I just got back from this thing and I am kind of hungry," and Dr. Strachan left and Mr. Tomsone came in.

Q. Did you have some conversation with Mr. Tomsone at that time?

A. I asked him what he wanted, and I said to him, "I am late. I haven't had any lunch and I thought maybe I would go down to the canteen and have a cup of coffee."

He said, "Let's go down to the canteen and have a cup of coffee."



(Testimony of Theodore S. Gage)

Q. Did you go with him to the canteen?

A. Yes, I went to the canteen.

Q. While you were in the canteen, did you and Mr. Tomson engage in any conversation? [232]

A. No, there was no conversation.

Q. How long were you in the canteen approximately?

A. Oh, the required time to drink a cup of coffee.

Q. What did you do after that?

A. Then we left and came back towards the main corridor of the outpatient building, and as I got to the intersection where it splits to go down to my office, I told him I was going down to the parking lot to my car to get some notes out of my car.

Q. Did you ask him to go with you?

A. No, he followed along.

Q. Your car was then parked in the auto park near—

A. In back of the hospital.

Q. In back of the hospital? A. That is right.

Q. Did you go out there in your white gown? You had your white gown on?

A. Yes, I went out in my white gown.

Q. What notes did you have out there in the car that you went to get?

A. I had some notes—I had been doing some research work, or some clinical work, on new treatments for the back, painful backs, and we had been gathering a lot of notes on our results and I was tabulating them and putting them in a paper form for publication. I had left those notes on the front [233] seat of my car.

Q. Was that your purpose in going to your car after you had had a cup of coffee at the canteen?

A. Yes, sir; that was my purpose in going to the car.

(Testimony of Theodore S. Gage)

Q. Now what, if anything, did Mr. Tomsone say or do when you went over to your car that afternoon?

A. I opened the front door, took my notes and, as I turned to face him, he extended his hand and in the palm of his hand he had a roll of bills, and he said, "Here, take this."

And I said, "What for?"

He said, "Well, you can use it. Take it."

Q. Did you take it? A. I did take it.

Q. What if anything did you do with it?

A. I put it, just as he had given it to me, in my left-hand pocket and walked back from the car into my office.

Q. Did you count it at any time? A. I did not.

Q. Did you know how much money was there at that time? A. I did not.

Q. Did you then go back into your office?

A. Yes, I walked into my office.

Q. What if anything happened when you went into your office? [234]

A. Well, I walked into my office, laid the notes on the table, and just then a patient came in, Mr. Tomsone came in, and I got to asking the patient one or two questions, and before I turned around four men had broken into the office and one of them said, "Dr. Gage?"

I said, "Yes."

He flashed a badge, U. S. Forestry Service, and I looked at it and I couldn't understand what it was, and he said, "You are under arrest."

Q. Were you asked if you had the money?

A. He said, "You have some money on you?"

And I said, "Yes."

Q. Did he ask you where it was? A. No.

(Testimony of Theodore S. Gage)

The Court: Where was it?

The Witness: It was in my left-hand pocket, sir.

By Mr. Sullivan:

Q. Did you remove it from your pocket, or did he?

A. I made an attempt to but he said, "Don't. Somebody else will do it." And they searched me.

The Court: When did you put it in your pocket?

The Witness: Out at the car park.

By Mr. Sullivan:

Q. When you were out at the auto park?

A. When I was out at the auto park. [235]

The Court: I thought you said you just threw it on the table.

The Witness: Oh, no, that was the notes I had in my hand.

By Mr. Sullivan:

Q. When you received this money that, when Mr. Tomson handed you this money and you put it in your pocket, what did you intend to do with it?

A. It was my intention to go to Dr. Long and put it on his desk and say, "Now hear the whole story."

Q. You had only been in your office a very short time until you were arrested, is that correct?

A. It couldn't have been more than a couple of minutes.

Q. At the time, on October 18, or at any time on or about that date, did you ever have any intention in your mind and heart to receive from Mr. Tomson any money for the purpose and with the intent of having your decision and action on any matters that might be brought before

(Testimony of Theodore S. Gage)

you in your official capacity as an orthopedic surgeon at the Veterans Administration influenced thereby?

A. Definitely not.

Q. Did you ever accept any money from Mr. Tomsone with the intention that you would cause more orders to be written for orthopedic shoes under his contract?

A. I did not. [236]

Q. Did you on or about the third day of October 1946, or any other time, ask Mr. Tomsone to pay or to give you any money with the intent to have your decision and action on any matters that might be brought before you in your official capacity as an orthopedic surgeon at the Veterans Administration in Sawtelle influenced thereby?

A. I did not.

Q. Did you ever at any time ask Mr. Tomsone to give you any money with the intention that in so doing that you would cause more orders to be written for orthopedic shoes under the contract which the Administration had with Mr. Tomsone?

A. I did not; no, sir.

Q. Could you tell the jury, Doctor, approximately how many patients or veterans that you examined each day there at the Veterans Administration, that is, that you personally examined?

A. Well, the average was about 30, and it fluctuated from 30 to 50, depending on whether the day was a clinic day or not. I held two clinics a week, on Tuesdays and Fridays, at which time I saw consultations from all over the city, from the office downtown, from other branches of the hospital—not the hospital, the outpatient service—and anybody that might come in for clinic treatment.

Q. How many days a week did you work there? [237]

A. When I started there it was a five and a half day week. I put in a five and a half day week.

(Testimony of Theodore S. Gage)

Q. You had Saturday afternoons and Sundays off?

A. That is correct.

Q. Were there any other occasions when you, after the examination of a patient, felt that he might have needed some orthopedic or corrective shoes and according to your diagnosis such was not required and you refused to issue a prescription to him, or where you had any complaint from the veteran or the patient in regard to your decision?

A. I had no complaints to me personally.

The Court: From the veteran?

The Witness: From the veteran.

By Mr. Sullivan:

Q. I think that you testified yesterday that there were instances where in your opinion as an orthopedic surgeon, orthopedic or corrective shoes were not required and that you did refuse to issue a prescription.

A. That is correct.

Q. Now in any instance where in your opinion an orthopedic or corrective shoe was not required, and you refused to issue a prescription, was that your honest and conscientious opinion as an orthopedic physician?

A. That is correct.

Q. And in every instance where you issued a prescription [238] for orthopedic or corrective shoes, or issued a prescription for such supports or for modification of shoes, was it your honest and conscientious opinion as an orthopedic physician and surgeon that such things were required? A. That is correct.

Mr. Sullivan: I think that is all, your Honor.

The Court: Cross examine.

(Testimony of Theodore S. Gage)

Cross Examination

By Mr. Neukom:

Q. Dr. Gage, you have seen this money before, haven't you?      A. I don't know.

Q. Did you have in your hands on October 18th a roll of money which approximates the feel of that?

A. I wouldn't remember what the feel is. I had in my hand on that date a roll of money.

Q. Mr. Chapman is the manager of the Veterans Facility, isn't he?

A. That is correct, of the Regional Office.

Q. In other words, he is the top man, isn't he?

A. That is correct, sir.

Q. Mr. Chapman had always accorded you considerable decency and kindness in any complaints that you had taken to him, had he not?

A. I only came to him on one specific instance. [239]

Q. He had an open door, was your testimony.

A. That is correct.

Q. And he talked to you?      A. That is right.

Q. And you told him about complaints and troubles that you had been having?      A. That is right.

Q. And you told him about difficulties encountered with Mr. Tomsone, didn't you?      A. I did.

Q. Why didn't you go to Col. Chapman's office right after you had received this money in the auto park and thrown it on his desk and tell him about it?

A. With the office full of men I couldn't get out.

Q. Dr. Gage, would you have us understand that after you had had relations with a man, Mr. Tomsone, that you believed were irregular, who offered you a bribe, that the most important thing in your mind would not have been



(Testimony of Theodore S. Gage)

to have gone to Col. Chapman and have laid that matter before him?

A. It was my intention to go to my superiors.

Q. Would you have us believe, as you have expressed opinions here and expressed your conscience, would you have us believe that there was anything more important in your mind than to free yourself of any implication of having accepted this money from Mr. Tomsone? [240]

A. No, I would not have you believe otherwise.

Q. Yet you did go into your office, didn't you?

A. Yes.

Q. As a matter of fact, you said to the agents when they came in, words to this effect, "I expected this." You knew this would happen, didn't you?

A. I did not say that to any agent or anyone.

Q. Do you recognize the gentleman that I am about to take a badge from?

A. I recognize Mr. Davis; yes.

Q. He accompanied the officers that made the arrest?

A. That is correct. He was the arresting officer.

Q. And didn't he display to you this badge when he made the arrest?

A. (Examining) He did not.

Q. He didn't display to you a Federal Bureau of Investigation badge? A. No, sir, he did not.

Q. He displayed to you a Forrestry Service badge?

A. That is correct. I commented to him about it. I said, "When does the FBI use Forestry Service badges?" And he said, "Oh, we use many kinds."

(Testimony of Theodore S. Gage)

Q. Is it not true that the Mayfair Restaurant, where you and Mr. Tomsons went to lunch, that your wife happened to be in that restaurant on October 3rd? [241]

A. She didn't happen to be there; no, sir.

Q. She wasn't there?

A. She came in as we were leaving with a party of women.

Q. As a matter of fact, that explains how you happened to direct Mr. Tomsons to go there, doesn't it?

A. Definitely not.

Q. It is merely a coincidence that she happened to be there the same time? A. Exactly; yes.

Q. Early in October you gave to Mr. Tomsons, I believe your address where you were living in Santa Monica, isn't that correct? A. No, sir.

Q. When was it then?

A. Sometime in September, the early part of September.

Q. Very well. Prior to that time you had noted that Mr. Tomsons's work was defective and inferior, hadn't you? A. That is right.

Q. And you had complained, so you state, to Dr. Long and to your other co-assistants about the inferiority of his work, hadn't you? A. That is correct.

Q. And you felt that he was not giving the Government a square deal, didn't you?

A. That is correct. [242]

Q. And in your opinion he was cheating the Government, wasn't he? A. That is correct.

Q. He spoke to you about wanting to come over to your house to give you spaghetti, didn't he?

A. No, he did not.

(Testimony of Theodore S. Gage)

Q. He suggested to you that he could suggest where you could have a spaghetti feed?

A. He said that he would take us to dinner.

Q. Dr. Gage, would you have this jury believe that a man was cheating the Government under defective shoes, defective material, would be the type of man that you would suggest take you and your wife out to dinner?

A. I see nothing wrong with that.

Q. When he offered you the check book out on your desk, will you please tell me your very words that you told Col. Bringham about that incident.

A. I never spoke to Col. Bringham.

Q. Did you ever speak to Col. Bringham at all with regard to what you considered was the defective character of Mr. Tomsone's shoes and devices?

A. I did not ever speak to Col. Bringham at any time pertaining to Mr. Hubert Tomsone.

Q. Col. Bringham used to be the head out there—I am sorry. [243]

Did you ever speak to Mr. Chapman with respect to a check, the incident with Mr. Tomsone that put upon your desk his checkbook and told you to write out a check?

A. No, I did not speak to Mr. Chapman about that.

Q. As a matter of fact, what you spoke to Mr. Chapman about was a matter involving your difficulty because of your own abusive conduct with a clerk, difficulty that you had had there at the offices, isn't that so?

A. That is not correct.

Q. You had had difficulty and you had told Mr. Nie that you had had difficulty with the clerk out there, isn't that true?

A. I had had no difficulty with any clerk.

(Testimony of Theodore S. Gage)

Q. Dr. Gage, isn't it true that when you first went to work for this establishment, like you have testified upon direct examination, I believe that you told Dr. Long you had no intention of staying but a very short time?

A. That is correct.

Q. As a matter of fact, it might have been just a matter of a few weeks, isn't that true?

A. That is correct.

Q. Dr. Gage, how did you happen to then have such an inquisitive mind as to this contract if you knew that you were only going to stay a few weeks, this shoe contract?

A. My staying was predicated, or the length of my stay, [244] as I testified, was predicated upon the receiving of a license to practice in the state of California. I told that to Dr. Long, and when I failed the examination on August 3rd, there was nothing further said, and since it was my intent to stay here and take it again I just continued working.

As to my inquisitiveness about the contract, the things were so glaring that one would have to put blinders on and a mask not to see the defects.

Q. In the contract?

A. Both in the contract and in the execution of the contract.

Q. Dr. Gage, I am going to show you Government's Exhibit No. 3, and I assume this is the contract that you referred to, isn't it?

A. (Examining document) This is a copy of it; yes.

(Testimony of Theodore S. Gage)

Q. Very well. You had access to another duplicate copy, isn't that correct? A. That is correct.

Q. Didn't this contract have embodied as a part of it 51 distinct items that were specifically referred to?

A. That is correct.

Q. And they covered virtually the whole field of orthopedic supplies, so far as shoes are concerned, did they not?

A. That is incorrect. They did not cover the entire field. [245]

Q. This is a standard form, as you will note, approved U. S. Standard Form 33, revised, approved by the Secretary of the Treasury January 17, 1939, isn't that correct?

A. The first six pages of this contract are the accepted standard form of it approved by the Secretary. The remainder is a mimeographed form that does not state except it is Medical Form 2618 c.

Q. You will note that this is an instrument which is an invitation from the Government to a person rather than a person preparing this for the Government's acceptance, isn't that true? A. It perhaps is.

Q. Now, Doctor, let's you and I read some of this contract. Will you turn to page 3, item 7. You had read this contract before Mr. Hubert Tomsone returned and you and he had your argument after which you made up and became friends? You had read it before that, hadn't you? A. Yes, sir.

(Testimony of Theodore S. Gage)

Q. Reading No. 7: "The Facility reserves the right to reject all items which are faulty in construction, or in which the materials are of unsatisfactory quality." You have read that?      A. I have read that.

Q. And as a doctor prescribing shoes you knew that it was your duty to approve, inspect and check all shoes that [246] Mr. Tomsone furnished pursuant to this contract, didn't you?      A. That is correct.

Q. It was one of your obligations, wasn't it?

A. That is right.

Q. Will you please read item No. 8: "No item will be approved for payment until it has been inspected by an authorized representative of the Facility. Acceptance will be governed by the quality of materials, character of workmanship and accuracy of fittings. Before final rejection is made, reasonable opportunity will be given contractor to make the required corrections of faults and adjustments." You were familiar with that?

A. Yes, I was.

Q. As a matter of fact, Doctor, you knew that if any single item made by Mr. Tomsone did not receive your approval or one of your co-associate's approval, that he wouldn't get one thin dime for it until he corrected it, isn't that correct?      A. That is correct.

The Court: I see it is 12:00 o'clock. Recess until 2:00. Remember the admonition.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock of the same date.) [247]



Los Angeles, California, December 12, 1946, 2:00 p.m.

The Court: Are you ready to proceed, gentlemen?

Mr. Sullivan: We are ready, your Honor.

The Court: The usual stipulation?

Mr. Sullivan: Yes, the usual stipulation.

Mr. Neukom: Yes, your Honor.

The Court: Mr. Gage, will you take the stand?

THEODORE S. GAGE,

called as a witness by and on behalf of the defendant, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination (Resumed)

By Mr. Neukom:

Q. Dr. Gage, could it have been that you took annual leave from the 7th to the 10th of October of 1946, rather than in the last week of September?

A. I don't think so.

Q. At any rate, when you took your annual leave that was the occasion that you and your wife went to Mr. Tomsons's shop on West 7th Street, is that correct?

A. It was during that time.

Q. And your wife only went there upon one occasion?

A. That is correct.

Q. And Mr. Tomsons was going to make some corrective shoes or work upon some shoes that your wife had, is that [248] correct?

A. He did work upon the shoes that she wore into the shop that day.

Q. And that was after you had ascertained that Mr. Tomsons's work was imperfect and was not of high quality, isn't that true?

A. No, sir.

(Testimony of Theodore S. Gage)

Q. When did you first ascertain that Mr. Tomisone's work was inferior and not of good quality?

A. His work at the Veterans Hospital I ascertained early in my employment in August was of inferior quality and craftsmanship according to the specifications noted in the contract.

Q. Wasn't it late in September, according to your testimony upon direct examination, that you and your wife went down to the shop?

A. That is correct. And the type of work that he did—I supervised it personally and any ordinary shoemaker could have done as much.

Q. You were working for the Veterans Administration on October 18th at the hour of, between two and three, at the time you had this \$100.00 in your pocket, were you not?

A. Not at that hour, sir, not at two o'clock.

Q. At the hour of three o'clock then?

A. At about three o'clock, yes, sir. [249]

Q. And prior to that time you had authority to prescribe to veterans for the manufacture of specially built shoes that were to be built by Mr. Tomisone, did you not?

A. I had authority with restrictions.

Q. Well, at least you were clothed and were permitted to make recommendations or to write prescriptions for such shoes, were you not?

A. In my professional capacity, yes.

Q. And you did, did you not?

A. That is correct.

Q. May I inquire of you, Dr. Gage, is it not true that many shoes that are built for people who have unusual deformities and defects, is it not quite usual that over

(Testimony of Theodore S. Gage)

a course of time that people will complain for one reason or another about such devices?

A. Not as a general rule, no, sir, not with the disabilities that we see there.

Q. It has been your experience then, with the exception of Mr. Tomsone, that all orthopedic constructors of devices and shoes have without fail made a person satisfactory shoes in all instances?

A. Those that were orthopedic craftsmen and technicians did, yes, sir.

Q. And you have known of no one in that category that has ever had to remodify or change or alter the shoes from the [250] original prescription?

A. That is part of the building process, the changing and modification and rebuilding until a perfect fit is made.

Q. Then if I understand you correctly, it is true, is it not, that in dealing with a person who has an ailment, an unfortunate ailment of the foot or leg that there are elements that have to be gone through—in other words, it is a progressive matter of correcting his ailment to a particular shoe, isn't that true?

A. No, sir. Counsel is restricting his questions now to an ailment, the type of work that I did, had to do with disabilities, war injuries—the residuals of war wounds.

Q. Didn't you prescribe shoes?

A. That is correct, I did prescribe shoes.

Q. Shoes that were built by Mr. Tomsone?

A. That is correct.

Q. And is it not true that a shoe that is put on today may not be satisfactory three months or six months from

(Testimony of Theodore S. Gage)

now as a condition may correct itself from the initial correction of the first shoe?

A. That is not generally correct, no, sir.

Q. Would you say that that is unusual?

A. In the type of injuries I was dealing with I would say it was unusual, yes, sir.

Q. Doctor, is it not true that a person may start wear- [251] ing a corrective shoe and they are wearing the corrective shoe to overcome or to assist the disability they are suffering from, aren't they?

A. I don't believe that counsel understand the type of work we did out there. In a corrective shoe—I believe counsel refers to an ailment, as he said. We were dealing with total disabilities. We were dealing with a man who came in with a half a foot. He only had the back portion of a foot or he only had one toe on the foot and we had to make shoes for that man so he could walk out in society and look like everyone else. There was no progressive change in that particular case and those were the only type of cases I saw. They were the service connected injuries. I had nothing to do whatsoever with non-service connected injuries.

Q. Did you find that sometimes people had broken-down arches?

A. Yes, there were many of those.

Q. And they are just as the term states—they use corrective shoes, don't they?

A. Those were usually non-service connected injuries. There were a few at times that had service connection. I think the majority of the cases that I saw there that required arch supports for correction were perhaps World War I veterans and what the procedure in those days or

(Testimony of Theodore S. Gage)

the regulations, I do not know. I am not conversant or acquainted with [252] what they were in those days.

Q. Did you know a patient by the name of Arthur L. Valentine?      A. I do.

Q. And you knew when you came to work that the former head of the orthopedic department had approved him for shoes, did you not?      A. I did not.

Q. Did you not know that Dr. Nie had also approved Arthur L. Valentine for shoes?

A. Previously to my coming on this job I understand from the record that Dr. Nie had prescribed a pair of specially-built shoes for Mr. Valentine.

Q. And then is it not true that you obtained the file and countermanded Dr. Nie's order for shoes early in September?      A. That is definitely not true.

Q. You did not countermand or cancel an order that Dr. Nie had made?

A. I did not countermand nor cancel an order.

Q. Did you have anything to do with the cessation or the temporary stopping of providing shoes for Mr. Valentine?

A. Yes. Mr. Valentine came to me and complained about the shoes that he had from Hubert Tomson. He said they had never been a proper fit and he was quite perturbed about [253] it. He said he had come to Dr. Nie, had seen Dr. Nie who had prescribed these shoes for him and he wasn't at all satisfied with them and he was mighty tired of being, as he put it, if I remember his words, "pushed around", and he wanted something done. He had heard there was a new orthopedic man there and he came to me. I examined Mr. Valentine's feet. I told him that from my examination and my honest medical



(Testimony of Theodore S. Gage)

opinion that he did not require a special pair of \$43.00 orthopedic shoes; that if he would bring in any pair of shoes that he could buy in any store in town I would see that they were modified with the proper correction which I believed would give him the proper relief. He was quite perturbed about that and he said, "I won't accept that. I have always gotten a pair of shoes here and I am entitled to them." I said to him, "Mr. Valentine, it is not a question of whether you are entitled to it. It is a question of whether the indication exists. I recognize that we are all entitled—we are all veterans, but in my capacity here I feel that spending Government money is a little—"

Mr. Neukom: I object to the speech from the witness.

Mr. Sullivan: He is telling what he said to Valentine.

The Court: Objection overruled. This is a conversation.

The Witness: This is a conversation.

Mr. Neukom: May we have it read so we can understand the tenor or the nature of the conversation? [254]

The Court: I don't think there is any necessity for reading the question and answer.

Mr. Neukom: All right, your Honor.

The Witness: I tried to make Mr. Valentine understand that it was not that I was refusing him—

The Court: What did you say to him?

The Witness: I said that I felt that as the chief of this department it was not a question of whether he was entitled to it; it was a question of whether the indication existed, whether the pathology was there in his feet and according to regulations necessitated a special pair of shoes being built for him. He walked out of my office quite unsatisfied. I did not see him until some weeks later when



(Testimony of Theodore S. Gage)

I discovered, or, I was told that he had gone into Dr. Long and complained that I had refused him a pair of special built shoes.

I told Dr. Long it was not a refusal; that I saw no necessity for prescribing a pair of specially built shoes; that I had recommended, as the record will show, that his shoes be modified on his own shoes.

Well, it was quite an argument—

The Court: We are getting way off of the question now.

The Witness: Well, that is the story.

The Court: We were talking about a conversation you had with Mr. Valentine. [255]

The Witness: That is the end of the conversation.

Q. By Mr. Neukom: You knew that Dr. Nie had ordered shoes of a similar character that he had been wearing just prior to this conversation you had with him, did you not?

A. Oh, I knew that Dr. Nie before me for 17 years had prescribed lots of shoes.

The Court: The question was whether or not you knew he prescribed shoes for this man.

The Witness: The pair of shoes previous? Yes.

Q. By Mr. Neukom: Then a few weeks later you did put in a prescription authorizing this man to get this pair of shoes, did you not? A. That is correct.

Q. As a matter of fact, Dr. Gage, wasn't what was in your mind when you were looking at this contract and reading all of its provisions and going over the items that you claimed were deficient and that this contract was not fair, wasn't it actually in your mind the fact that you then were contemplating in your mind a means whereby

(Testimony of Theodore S. Gage)

you could get a secession of that contract and could secure it yourself?       A. Definitely not.

Q. Doctor, is it customary for a doctor as soon as he goes to work for an organization to immediately start in finding out all about the financial aspects and the contractual aspects of a Veterans Administration contract with a contractor? [256]

Mr. Sullivan: I am going to object to that as calling for a conclusion on his part.

Mr. Neukom: I will withdraw the question.

Q. You knew Mr. Tomson had had a contract for three years before that, didn't you?       A. I did not.

Q. You knew that he had had a contract there with the Veterans Administration, didn't you?

A. I knew he had the present one.

Q. And you felt that you were going to step in there within a month's time and alter all of the existing conditions there, is that correct?

A. That is not correct, no, sir.

Q. Will you tell us what you told Dr. Long about—specifically as to what was wrong with the work that Mr. Tomson was doing?

A. I could sit here for the next 24 hours, perhaps, telling that.

Q. I will stay as long as you will.

A. On numerous occasions at the beginning, in August, when I started to work there and then later complaints started to come in.

Q. I am asking you what you told Dr. Long?

A. I am getting to that, Mr. Counsel.

The Court: Answer the question, Mr. Witness. Your [257] lawyer is here. He will give you an oppor-

(Testimony of Theodore S. Gage)

tunity to explain anything that needs explaining. Counsel wants to know what you told Dr. Long. That is the question. It is very simple.

Q. By Mr. Neukom: About the imperfection of Mr. Tomsone's work. That is my question.

A. Well, one of the specific incidents comes to me in which a shoe—

The Court: What did you tell Dr. Long?

The Witness: Well, I had to bring this shoe into it.

The Court: Tell us what you told Dr. Long and then you may explain afterwards.

The Witness: I told Dr. Long this shoe did not meet the terms of the contract; that certain specifications of the contract were being violated; that certain changes or certain modifications in the shoes were being made in excess of the price charged the general public as stipulated in the contract. That in the specially built shoes for which the Government was paying \$43.00, it called for prime leather and there was no prime leather. I told him that in the—

The Court: Just a moment.

You may proceed.

The Witness: That in many of the specially built shoes where the contract called for the steel shank there was no steel shank in there. That the heel was usually nailed directly to the sole in contradiction to the ordinary art of [258] shoemaking; that a platform was usually placed there first before the rubber heel was nailed on. As a result of that the nails many times went through on the inside of the shoe. That the eyelets were not properly made. That the linings did not last. That the leather cracked.

(Testimony of Theodore S. Gage)

Q. By Mr. Neukom: Is that all?

A. That is all, sir.

Q. These shoes that were built by Mr. Tomsone were all specially built, weren't they?

A. That is correct.

Q. It was not like going into a store and being able to buy a pair of shoes? A. As a rule, no.

Q. And \$43.00 for a pair of specially built shoes where a cast is used and much labor is consumed on one individual, custom job, is not an exorbitant price, is it, Dr. Gage?

A. I would say it is a very cheap price. There was no cast ever made to my knowledge during my employment there by Mr. Tomsone at the hospital or at the outpatient department.

Q. Specially built shoes and the following of minute descriptions which you gave for a custom job, \$43.00 is not a high price, is it?

A. I said, Mr. Counsel, that present rates today—under present rates it is very cheap. I don't see how he could produce a good shoe at that price. [259]

Q. Then that phase of the contract was very reasonable, was it not? A. I would say the price, yes.

Q. Now, did you tell Mr. Chapman substantially the same thing that you told Dr. Long?

A. Substantially the same.

Q. You saw him only upon one occasion?

A. One occasion, right, sir.

Q. You were taken to the office of the FBI, were you not? A. That is right.

Q. And you asked to place a call to your wife, did you not? A. Yes, sir.

(Testimony of Theodore S. Gage)

Q. And at about 5:38 p.m. you were advised that the call had come through? A. Yes.

The Court: We will have to take a short recess here.  
(Short recess.)

The Court: You may proceed.

Q. By Mr. Neukom: Before the recess I was inquiring of you if a call was not placed while you were in the office of the FBI in the William Tell Motel about the hour of 5:30 or thereabouts?

A. I believe that is correct. [260]

Q. And you talked to your wife, did you not, on the telephone? A. I believe so, yes, sir.

Q. And you were talking in the presence of Agent Davis to my right here, were you?

A. That is correct.

Q. And among other things didn't you say after some conversation on the telephone, "Yes, I took the money—took that money"? Did you say that or did you not?

A. I have admitted that I took the money.

The Court: Just a moment. Read the question.

(Question read.)

The Witness: I don't remember that conversation in Mr. Davis' office.

Q. By Mr. Neukom: From the time that you had taken the money until the time that you talked to your wife on the telephone you had not talked to her in that intervening period, had you?

A. No, I hadn't seen her from the time I left the house in the morning.

Q. Had you talked to her? A. No.

Q. Didn't you also state: "I can't mention that over the telephone"?



(Testimony of Theodore S. Gage)

A. I don't recall that conversation at that time. At [261] that moment I was pretty excited and quite nervous and upset.

Mr. Neukom: That is all.

The Court: Redirect.

Mr. Sullivan: Just one or two questions, your Honor.

Redirect Examination

By Mr. Sullivan:

Q. Dr. Gage, in your cross examination you testified that after refusing to issue a special order to Mr. Valentine for a pair of specially built shoes or a prescription for a special pair of specially built shoes, that a few weeks later you did authorize him to procure a pair of shoes. Is that correct? A. That is correct.

Q. And why did you a few weeks thereafter issue a prescription to him to secure a pair of specially built shoes?

A. I was told to by Dr. Long. It seemed to be the policy of appeasement. If the veteran raised enough rumpus there he would much rather let him have his own way than to stand up for the men that worked under him as a subordinate.

Mr. Neukom: Do I understand the latter part of his answer is a statement made to Dr. Long or is it a statement of the witness? I move it be stricken.

Mr. Sullivan: I think it is an explanation as to why he issued the order.

Mr. Neukom: I will withdraw my objection. [262]

The Court: Very well.

Q. By Mr. Sullivan: Were there any other instances during the time that you were employed there when you refused to issue a prescription for a pair of shoes when



(Testimony of Theodore S. Gage)

you had received any instructions from Dr. Long or anyone else to issue the prescription?

A. Oh, yes, there were a number of occasions.

Q. Now, you testified that you regarded it reasonable that \$43.00—that \$43.00 was a reasonable value for a pair of specially built shoes, is that correct?

A. That is correct.

Q. Now, when you said that \$43.00 was a reasonable value for a pair of specially built shoes were you referring to what would be the reasonable value of a pair of specially built shoes which were built according to the specifications of the contract that existed between the Veterans Administration and Mr. Tomsone?

A. That is correct.

Q. During your years of practice as an orthopedic surgeon have you had occasion to order shoes for people, that is, specially built shoes? A. Many times.

Q. And are you familiar with the reasonable value of specially built shoes, orthopedic shoes?

A. I am. [263]

Q. And while you were employed at the Veterans Administration did you have occasion to examine the specially built shoes that were made by Mr. Tomsone under the contract which he had with the Administration?

A. I did.

Q. And do you have an opinion as to the reasonable value of the shoes that he was making?

A. They were not worth—

Mr. Neukom: I object to this as being too general and too indefinite and not a proper foundation. There isn't any proper qualification as to time. There has been no

(Testimony of Theodore S. Gage)

testimony that this witness knew anything about the price of shoes at the date in question.

The Court: Overruled.

The Witness: I believe the price was in excess—it was too much for the value in the shoe he produced for the Government.

Q. By Mr. Sullivan: You were arrested at what time, Dr. Gage, on the 18th, approximately?

A. Approximately three o'clock.

Q. What was your usual hour for leaving work out there? A. 4:45 was my quitting time.

Q. And after being arrested you were in custody continuously from that time until you made this telephone call to your wife? [264] A. I was.

Q. And you were in custody of the FBI during all that period of time? A. That is correct.

Q. And before making this call to your wife had you been permitted to communicate with anyone whatsoever?

A. No, sir. I asked if I might and I was told I could not.

Q. And had you consulted or been advised by any attorney with relation to your rights? A. No.

Mr. Sullivan: I think that is all I have, Doctor.

Mr. Neukom: Just one question.

#### Recross Examination

By Mr. Neukom:

Q. You had not consulted or been advised by an attorney when you accepted the \$100.00 from Mr. Tomsone?

A. No, I had not.

Mr. Neukom: That is all.

Mr. Sullivan: That is all, Doctor.

The Court: Step down. Next witness. [265]

CHARLES E. STRACHAN,

called as a witness by and on behalf of the defendant,  
having been first duly sworn, was examined and testified  
as follows:

The Clerk: State your full name.

The Witness: Charles E. Strachan.

Direct Examination

By Mr. Sullivan:

Q. And you address?

A. 2864 Themall, Los Angeles.

Mr. Sullivan: Shall we wait until we get the other  
reporter?

The Court: Go ahead. We will have to stop at three  
o'clock and have another change of reporters.

Q. By Mr. Sullivan: What is your business or  
profession? A. I am a physician.

Q. Are you a graduate of any medical college?

A. College of Medical Evangelists.

Q. When did you graduate from the College of Medi-  
cal Evangelists? A. 1945.

The Court: Los Angeles?

The Witness: Yes.

Q. By Mr. Sullivan: And what is your occupation  
at [266] the present time?

A. I am a physician. Just how do you mean? Who  
am I employed by?

Q. Are you actively engaged in your profession as a  
physician at the present time? A. Yes, sir; I am.

Q. And are you practicing for yourself or are you  
employed somewhere?

A. I am employed by the Army of the United States.

Q. And in connection with that are you employed as  
a doctor? A. That is right.

(Testimony of Charles E. Strachan)

Q. And in connection with your employment as a doctor by the Army of the United States, where are you assigned?

A. The Los Angeles Regional Office of the Veterans Administration.

Q. Is that out here at a place known commonly as Sawtelle?

A. It is now, yes, sir.

Q. And how long have you been assigned to that Veterans Administration at Sawtelle?

A. I believe it was since August 28th, 1946.

Q. And are you acquainted with Dr. Theodore Gage, the gentleman seated at counsel table?

A. Yes, sir, I am. [267]

Q. And when did you first meet Dr. Gage?

A. I don't remember exactly. I believe it was some time in September.

Q. Were you ever assigned to work in the orthopedic unit at the Veterans Administration, outpatient department?

A. Yes, I was.

Q. When were you assigned to the orthopedic unit there?

A. I believe it was some time in September. I don't exactly remember when.

Q. You don't remember the exact date?

A. No, sir, I do not.

Q. Well, in connection with your assignment to the orthopedic unit of the Veterans Administration did you have occasion there to see and observe the manner in which Dr. Gage examined and diagnosed the conditions of patients who came under his jurisdiction there?

A. Yes, sir.

Mr. Neukom: I object because I think this is collateral. This man is not being tried for malfeasance in office or

(Testimony of Charles E. Strachan)

for his ability or lack of ability. It is a collateral issue to the whole case. The whole issue in this case is whether or not—I base my objection upon that ground, your Honor.

The Court: Well, the examination of this witness has not proceeded sufficiently far to enable me to make a conclusion as to precisely what is expected to be proven. For the [268] present the objection is overruled.

Mr. Sullivan: Your Honor, I am willing to approach the bench with counsel and inform the court.

The Court: Let us proceed. We will know in a moment.

Mr. Sullivan: We haven't an answer to the last question.

The Court: Ask the question again.

Q. By Mr. Sullivan: From your observations of Dr. Gage's work there—withdraw that for a moment.

In what capacity was Dr. Gage employed there, do you know?

A. He was, I guess you would consider he was chief of the outpatient service of the orthopedic unit—I mean, chief of the orthopedic department in the outpatient service.

Q. And from your observation of his examinations and diagnosis of the condition of patients there, did you have occasion to observe his conclusions and recommendations with respect to patients? A. Yes, sir, I did.

Q. And from your observation in that respect, Doctor, do you have an opinion as to whether or not his diagnosis and recommendation in so far as the patients were concerned was honest and sincere?

A. I believe so, yes.

(Testimony of Charles E. Strachan)

Q. Now, was there ever any time when Dr. Gage ever gave you instructions in any way, shape or form to the [269] effect that you were to—I think I am ahead of myself. I will withdraw that for a moment.

In connection with your work there, Doctor, in the orthopedic unit, did you have the authority in cases that came under your observation to issue prescriptions for orthopedic corrective shoes? A. Yes, sir.

The Court: Who gave you that authority?

The Witness: Well, it was a part of my duty as a doctor in that department.

The Court: That went with your appointment?

The Witness: Yes, sir.

The Court: Dr. Gage did not give you that authority?

The Witness: No, sir.

Q. By Mr. Sullivan: And did you ever at any time have any conversation with Dr. Gage in which he instructed you or told you in any manner, way, or shape whatsoever or said anything that would lead you to believe that you were to issue prescriptions for orthopedic shoes in cases where you did not honestly and conscientiously believe the veteran was entitled to them?

Mr. Neukom: That is calling for a conclusion of the witness. It invades the province of the jury.

The Court: Objection sustained.

Mr. Sullivan: That is all I have. [270]

Mr. Neukom: No questions.

The Court: Next witness.

Mr. Sullivan: Dr. Levine.



DAVID I. LEVINE,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: David I. Levine.

The Clerk: And your address?

The Witness: 6417 Lexington Avenue, Hollywood.

The Court: Just a moment. [271]

The Court: Usual stipulation?

Mr. Neukom: Usual stipulation.

Mr. Sullivan: Yes, your Honor.

Direct Examination

By Mr. Sullivan:

Q. What is your profession or occupation, Dr. Levine? A. I am a physician and surgeon.

Q. Are you practicing medicine and surgery at the present time? A. I am.

Q. Where are you practicing at the present time?

A. At the Veterans Administration, Regional Office, outpatient department at Sawtelle.

Q. You are attached to the Veterans Administration at Sawtelle? A. That is correct.

Q. You say at the outpatient department?

A. At the outpatient department.

Q. How long have you been practicing there as a physician and surgeon?

A. Since December 17 of last year.

Q. Are you acquainted with Dr. Theodore Gage, the gentleman seated at the counsel table? A. I am.

(Testimony of David I. Levine)

Q. How long have you known Dr. Gage? [272]

A. From the day he arrived at the Administration.

Q. Do you recall that that was the early part of August of this year?

A. It might have been. I don't recall the exact date.

Q. Would you see him there frequently in connection with his work and your work as doctors at the outpatient department?

A. I did.

Q. Let me ask you this, Dr. Levine: Was there ever any occasion when you heard Dr. Gage make any complaint about work that was being done by a man by the name of Hubert Tomsone who was making orthopedic shoes?

A. Would you repeat that question?

Q. I will withdraw it and reframe it.

Were there ever any occasions when you heard Dr. Gage when he ever made any complaints to you about the manner in which one Hubert Tomsone was making orthopedic shoes for the Administration out there?

A. I do not recall that it was made directly to me, but I do recall hearing the remark in the presence of a group of us.

Q. In the presence of a group of doctors?

A. That is correct.

Q. You heard him complain about Tomsone's shoes?

A. Yes, sir. [273]

(Testimony of David I. Levine)

Q. Do you recall whether or not he complained about the shoes because they weren't built according to the specifications in the contract?

A. I don't recall the exact wording, but I believe the remark was made with reference to the type of shoe, its poor manufacture and various other references along the same line.

Q. Now when you say you heard that made in a group was that among a group of the doctors assigned to the Administration there?

A. That is right.

Mr. Sullivan: That is all.

The Court: Cross examine.

Cross Examination

By Mr. Neukom:

Q. Had you been there quite a while, Dr. Levine?

A. Almost a year.

Q. About a year before that?

A. Why no, since December 17 of last year.

Q. You were in the orthopedic section too?

A. No, sir.

Mr. Neukom: That is all.

Mr. Sullivan: That is all.

The Court: You may be excused. This witness may be permanently excused?

Mr. Neukom: Just one more question, please. [274]

Q. You didn't communicate that complaint to Mr. Chapman, did you?

A. I didn't complain to anyone.

Mr. Neukom: That is all. Thank you.

(Witness excused.)

Mr. Sullivan: Dr. Kane.

## THEODORE J. KANE,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Theodore J. Kane; K-a-n-e.

The Clerk: Your address?

The Witness: 632 North Kings Road, Los Angeles.

## Direct Examination

By Mr. Sullivan:

Q. What is your business or profession, Dr. Kane?

A. Physician.

Q. Are you practicing as a physician at the present time? A. Yes.

Q. Where are you practicing?

A. At the outpatient department, Regional Office of the Veterans Administration in Los Angeles.

Q. Is that the one that is commonly known as Sawtelle? A. Yes, sir. [275]

Q. How long have you been practicing there as a physician?

A. I started work there in December 1945, worked until about May, had a temporary leave of absence for a couple of months, and started again July 15 and have been working there ever since.

Q. That was July 15 of this year?

A. This year.

Q. In connection with your work there as a physician, did you become acquainted with Dr. Theodore Gage, the gentleman seated at the counsel table? A. I did.

(Testimony of Theodore J. Kane)

Q. Do you know approximately when you first met Dr. Gage?      A. The day he reported for work.

Q. Did you see him from that time on on frequent occasions until he left the Administration there?

A. Yes, sir.

Q. Were there ever any occasions when you heard Dr. Gage, or when he ever made any complaint to you about the manner in which one Hubert Tomsone was building orthopedic shoes or making orthopedic shoes for the Veterans Administration?      A. There was.

Q. That happened on frequent occasions? [276]

A. Several occasions.

Mr. Sullivan: I think that is all. You may cross examine.

Cross Examination

By Mr. Neukom:

Q. What field of medicine were you in, Dr. Kane?

A. I do general practice.

Q. You were not in the orthopedic field?

A. No, sir.

Q. Dr. Gage complained about a lot of things while he was there, didn't he?      A. Yes.

Mr. Neukom: That is all.

The Court: You may be excused.

(Witness excused.)

The Court: Next witness.

Mr. Sullivan: Dr. Mazet.

## ROBERT MAZET, JR.,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Robert Mazet; M-a-z-e-t, Jr.

The Clerk: Your address?

The Witness: 703 - 24th Street, Santa Monica.

The Clerk: Be seated. [277]

## Direct Examination

By Mr. Sullivan:

Q. What is your occupation or profession, please?

A. Physician, sir.

Q. Are you practicing as a physician and surgeon at the present time?

A. Yes, sir.

Q. Where are you practicing?

A. Veterans' Hospital in Sawtelle.

Q. To what department of the hospital are you attached?

A. Orthopedic department.

Q. Are you attached to the Regional Office or to the—

A. To the hospital.

Q. —to the hospital?

A. Yes.

Q. How long have you been attached to the hospital?

A. Since the 1st of July.

Q. Of 1946?

A. This year; yes.

Q. The hospital to which you are attached out there does not treat the outpatients, is that correct?

A. That is correct.

Q. They are treated at the Regional Office?

A. Yes, sir.

Q. In connection with your work with the orthopedic [278] department of the hospital, did you have



(Testimony of Robert Mazet, Jr.)

occasion to become acquainted with Dr. Gage, Theodore Gage?     A. Yes, sir.

Q. Do you know in what capacity he was working there?     A. Yes.

Q. What was that?

A. He was the head of the orthopedic outpatient department.

Q. Was it your custom and Dr. Gage's custom to confer together from time to time in relation to the orthopedic cases?     A. Yes, sir.

Q. Now directing your attention to the early part of September of 1946, do you recall an occasion of being in Dr. Gage's office when Mr. Hubert Tomsone called there and there was somewhat of an argument that ensued between them?     A. Yes, sir.

Q. Do you recall whether or not on that occasion overhearing Dr. Gage make some complaint to Mr. Tomsone about the shoes that he was making?     A. Yes, sir.

Q. On that occasion did Mr. Tomsone say to Dr. Gage, in substance and effect, or rather did Dr. Gage say to Mr. Tomsone in substance and effect, "How's business?" and Tomsone replied— [279]

Mr. Neukom: Just a moment. I object to leading the witness. I think the witness should be inquired of as to what was said.

Mr. Sullivan: Your witness testified to the specific conversation.

Mr. Neukom: You mean this is for impeachment purposes?

Mr. Sullivan: That is all. I will withdraw it.

(Testimony of Robert Mazet, Jr.)

Mr. Neukom: If that is the purpose, go ahead then.

Mr. Sullivan: That was my only purpose.

The Court: Go ahead.

By Mr. Sullivan:

Q. And Mr. Tomsone replied, "Business is good," to which Dr. Gage said, "I don't think so," and Tomsone said, "Why not?" and Dr. Gage said, in substance and effect, "I know there has to be another change, there have been a lot of veterans getting shoes who are not entitled to them and I have canceled quite a few orders"?

A. I never heard any such conversation between those two people.

Mr. Sullivan: That is all. Thank you, Doctor.

#### Cross Examination

By Mr. Neukom:

Q. You were not of course present every time that Mr. Tomsone and Dr. Gage spoke to each other, were you?

A. No, sir.

Q. You were entirely separate and apart, were you [280] not?

A. Yes, sir.

The Court: Is that the only time you were present when they discussed any matter?

The Witness: No, sir. I was there several times when Gage and Tomsone were there.

By Mr. Neukom:

Q. When Dr. Gage and Mr. Tomsone were there?

A. Yes.

Q. Mr. Tomsone built shoes for your department, didn't he?

A. Yes.

Q. Mr. Tomsone built shoes for your department, didn't he?

A. Yes.

(Testimony of Robert Mazet, Jr.)

Q. And all shoes that he built had to receive the approval of the doctor when they were accepted?

A. Yes, sir.

Q. And if they were not approved he was not paid, isn't that correct?           A. Yes, sir.

Q. You have inspected his shoes, haven't you?

A. Yes, sir.

Q. Did they meet your specifications?

A. It is a little hard to answer that yes or no. [281]

The Court: You can answer it yes or no and then explain if you wish.

The Witness: Would you say that again?

By Mr. Neukom:

Q. You have inspected shoes that Mr. Tomsone has built and delivered, have you not?           A. Yes, sir.

Q. And you have approved them?           A. Yes, sir.

Q. And by so doing you designated that they met the specifications of the contract, didn't you?

A. Yes, sir.

Mr. Neukom: That is all.

Redirect Examination

By Mr. Sullivan:

Q. When you were asked the question as to whether the shoes met the specifications of the contract, you said it would be hard for you to answer that question.

The Court: Yes or no.

(Testimony of Robert Mazet, Jr.)

Mr. Sullivan: Yes or no, and the Court informed you that you could answer the question yes or no and then explain your answer.

Q. Do you want to offer any explanation of your answer?

A. The thing I had in mind was that as far as specific [282] specifications written down on a piece of paper are concerned, my experience has been such that I can't very well translate that into an actual shoe. In other words, if they say certain specifications written down so-and-so, in terms of a shoe, that doesn't mean a good deal to me. That is what I was getting at.

The Court: Pardon me. Is there a Dr. Kuhn here?

Mr. Sullivan: Dr. Kuhn was here under subpoena and I conferred with Dr. Long and he informed me he was the only doctor he had on duty this afternoon and I let him go back.

The Court: There is a telephone message for him to be at Sawtelle by 4:30.

Mr. Sullivan: I excused him under the circumstances, your Honor.

That is all. I have no further questions.

Mr. Neukom: That is all.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Sullivan: Mr. Skill.

FRED SKILL,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Fred Skill; S-k-i-l-l. [283]

The Clerk: Your address?

The Witness: 119 West Broadway. That is my business address.

The Clerk: What city?

The Witness: Long Beach.

Direct Examination

By Mr. Sullivan:

Q. Do you live in Long Beach, Mr. Skill?

A. I do.

Q. What is your business or occupation?

A. I have a shoe shop.

Q. By that do you mean a shoe repair shop?

A. Well, shoe repair shop and we make shoes too.

Q. How long have you been in the shoe repair business? A. Since 1910.

Q. How long have you been in the shoe repair business in Long Beach? A. Since 1910.

Q. Are you acquainted with one Hubert Tomsone?

A. I ought to be. He worked for me.

Q. When did you first come to know Mr. Tomsone?

A. I think he worked for me in 1934, '34 or '35.

Q. Do you know approximately how long he worked for you?

A. Well, he didn't work very long because if he did— [284]

(Testimony of Fred Skill)

Mr. Neukom: Just a moment. I know precisely what this type of testimony is. I would like to have the jury excused, or at least allow me to conduct a voir dire on this particular witness. I believe this is an attempt to indirectly accomplish what is forbidden by the code and the cases. It is a delicate matter to discuss in the presence of the jury.

Mr. Sullivan: I have no objection to the jury being excused if counsel desires to discuss it, but I state this to the Court, that I have no intention of indirectly accomplishing what I am not legally entitled to accomplish as far as the evidence is concerned.

Mr. Neukom: I believe this is going to be offered for the purpose of impeachment, and I believe counsel will so concede.

Mr. Sullivan: Yes.

The Court: If it is offered for the purpose of impeachment, impeachment may be accomplished by the direct testimony contradicting the witness' testimony, evidence of his reputation for truth, honesty and integrity in the community where he resides.

Mr. Sullivan: Exactly, your Honor.

Mr. Neukom: There is some remoteness as to the time in question. Those are things that I would like to be able to ascertain on voir dire from this witness.

The Court: Let me ask this witness. You say that Mr. [285] Tomsone worker for you?

The Witness: Yes.

The Court: When?

The Witness: 1934.

The Court: 1934?

The Witness: Yes.



(Testimony of Fred Skill)

The Court: He has not worked for you since?

The Witness: No.

The Court: That was 12 years ago?

The Witness: Yes.

The Court: Ask your next question.

By Mr. Sullivan:

Q. Are you familiar with Mr. Tomsons's general reputation for truth, honesty and integrity in the community in which he has resided?

Mr. Neukom: I object to that as being too remote, your Honor.

The Court: Overruled.

Mr. Neukom: Further I wish to interpose this objection, that the short period of working for a person is not sufficient, as I understand the law. There is law directly upon the proposition. I should be able to inquire if he knows his reputation in the community in which he lives.

The Court: You can cross examine him on that.

Mr. Neukom: Very well, your Honor. [286]

The Court: He just asked him if he knew his reputation and he has a right to answer yes or no.

Mr. Sullivan: Will you repeat the question, Mr. Reporter.

(The question referred to was read by the reporter, as follows:

("Q. Are you familiar with Mr. Tomsons's general reputation for truth, honesty and integrity in the community in which he has resided?")

(Testimony of Fred Skill)

By Mr. Sullivan:

Q. (Continuing) You can answer that yes or no.

A. I do.

Q. Is it good or bad? A. Pretty rotten.

Q. Would you believe him under oath? A. No.

Mr. Sullivan: That is all. Thank you.

The Court: Cross examine.

### Cross Examination

By Mr. Neukom:

Q. Mr. Skill, Mr. Tomsone was a young man working for you in 1934 and you sent him with some shoes to another place of business to pick up a check, didn't you?

A. That isn't so.

Q. You did send him to a place of business to pick up [287] a check?

A. That isn't so. That is a lie.

Q. You don't like Mr. Tomsone, do you?

A. Yes, I liked him. I liked him so much that I had him in my house and treated him like a son until he proved what rat he was.

Q. You went and had him arrested, didn't you?

A. I had him arrested.

Q. And as a result of your arrest he served 20 days in jail, didn't he? A. He did.

Q. And that was purely because you complained against him, wasn't it?

A. Complained against him?

Q. Yes. A. I caught him—

(Testimony of Fred Skill)

The Court: Just a moment. You answer the question. Was it because you complained against him?

A. Why, of course.

By Mr. Neukom:

Q. You don't know where Mr. Tomsone went after he left Long Beach after that, do you?

A. I don't know what?

Q. He left Long Beach after that, didn't he?

A. Yes. [288]

Q. And you don't know where Mr. Tomsone lived after that, do you? A. No.

Q. You don't know where he lives now, do you?

A. I never inquired.

The Court: You have never seen him since 1934?

The Witness: No.

The Court: Or talked to him?

The Witness: No.

The Court: Or heard about him?

The Witness: No.

By Mr. Neukom:

Q. You haven't heard anyone in the community where he now resides ever discuss his character, have you?

A. I haven't heard a thing.

Q. Nor have you heard anyone—

The Court: Just a moment. The witness' testimony is stricken and the jury is instructed to disregard it on the Court's own motion, on the ground that it is too remote.

Mr. Sullivan: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Sullivan: Mr. Curry.

ALLEN E. CURRY,

called as a witness by and in behalf of the defendant, having [289] been first duly sworn,\* was examined and testified as follows:

The Clerk: Your name?

The Witness: Allen E. Curry.

The Clerk: Your address?

The Witness: 670 Shatto Place.

The Clerk: Los Angeles?

The Witness: Los Angeles.

Mr. Neukom: Your Honor, I cannot anticipate what a witness is going to say, but if the bell is rung once it is sometimes rung again and even the instruction or admonition of the court does not cure it. If this is to be of the same character of testimony, I think some inquiry ought to be had from the Court before the conclusion of the witness has been had.

The Court: Will counsel approach the bench?

(The following proceedings were had between Court and counsel at the bench outside the hearing of the jury:)

The Court: What do you propose to do, use him as a character witness?

Mr. Sullivan: As a character witness, your Honor. Also I propose to show by him that he had some shoes made by him and that while he was required under the contract to make a cast he never made a cast of this man's foot before making these shoes.

The Court: As a character witness, that will not be too [290] remote?

Mr. Sullivan: No. It will be within the last year, 18 months or two years.

(Testimony of Allen E. Curry)

Mr. Neukom: I didn't know that this was that witness. I knew you had some others from Long Beach.

The Court: Proceed.

(The following proceedings were again had in open court:)

Direct Examination

By Mr. Sullivan:

Q. Mr. Curry, what is your business or occupation, please? A. I am a jeweler, hand-made jeweler.

Q. Are you a veteran?

A. I am a campaign Marine from Haiti and Dominican Republic.

Q. Are you connected with any veterans' organizations?

A. I am very much so, the Veterans of Foreign Wars of the United States.

Q. In what capacity are you connected with them?

A. I am Past Post Commander; also Past Commander of the Military Order of the Cooties, Pup Tent No. 20, the Honorable Degree of the Veterans of Foreign Wars; also Chief of Staff of the Fifth District of the Veterans of Foreign Wars.

Q. Are you acquainted with Mr. Hubert Tomsone?

A. I am. [291]

Q. How long have you known Mr. Tomsone?

A. I have known Mr. Tomsone since around—I can't recall the exact date, but I think when he went to work for Mr. Woods, the shoe man out just off of Venice Boulevard—in around 1938 or '39.

Q. Have you know him since that time?

A. Ever since that time; yes.

Q. Down to the present time? A. That is right.

(Testimony of Allen E. Curry)

Q. Are you also acquainted with other people or veterans who have become acquainted with Mr. Tomsone?

A. Yes, I am. I have had quite a lot of veterans come to me with stories that they can't get shoes to fit them and what can they do about it.

Mr. Neukom: Just a moment.

Mr. Sullivan: Don't tell us what they said.

The Court: The jury is instructed to disregard that. If that is impeachment—

The Witness: They came to me—

The Court: Just a minute.

Mr. Sullivan: Just a minute.

Q. I just want you to tell if you are acquainted with other people who know Mr. Tomsone. A. Yes.

Q. At the present time? [292] A. Yes.

Q. Are you familiar with Mr. Tomsone's general reputation in the community in which he resides for truth, honesty and integrity.

The Court: Answer yes or no.

The Witness: I can't your Honor.

The Court: What is that?

The Witness: I can't answer that directly yes or no. I can answer it in the place of business but not where he resides at his home.

The Court: That is deemed to be his place of residence, I mean the business community is a man's residence.

The Witness: Yes, sir.

By Mr. Sullivan:

Q. Is it good or bad?

A. It is bad, very bad.

Q. Would you believe him under oath? A. No.



(Testimony of Allen E. Curry)

Q. Now, Mr. Curry, have you ever had occasion to procure from the Veterans Administration at Sawtelle a prescription or order for any orthopedic shoes to be made by Mr. Tomsone? A. Yes.

Q. Do you have a pair of his shoes on at the present time? [293] A. I have now; yes.

Q. The shoes which you are wearing now, were they made by Mr. Tomsone?

A. They were made by Mr. Tomsone about a year ago. Do you want to see them?

Q. Don't take them off now. Just hold them there a minute.

Was that the first pair of shoes that Mr. Tomsone ever made for you?

A. In his own shop; yes. He made others in other places.

Q. You say those shoes were made by him about a year ago? A. They were made in his shop.

Q. In his shop? A. Yes.

Q. Upon a prescription or order given you by the Veterans Administration to take to him and have the shoes made, is that correct? A. That is correct.

Q. Now on that occasion did Mr. Tomsone make any plaster cast of your feet? A. He did not.

Mr. Neukom: Now, your Honor, are we going to try the shoes in this case? I think that this is entirely collateral- [294] al to go into these individual complaints or affirmations of quality on all of these shoes that Mr. Tomsone may or may not have made. Dr. Gage has testified that he treated from, I think, 30 to 40 people a day. I think that this is entirely collateral to the case, to go into various complaints about some particular shoes,

(Testimony of Allen E. Curry)

and your Honor I believe is even under a duty to advise this jury with regard to the provisions of this contract, the approval features of this contract. We haven't requested it, but I think this is entirely collateral, and I object to it.

The Court: I do not see how this would be admissible, counsel. The contract is made and is a valid contract. We are not here trying the validity of the contract. We are not here trying the contractor or either party to it or their failure to live up to the contract. I do not see how this could possibly enter into the intention or the conduct of the defendant, which is the only way it would be admissible. Whether he made a plaster cast or he didn't make a plaster cast, the contract says that he will make it upon prescription. The doctors who have been on the witness stand have testified that they gave the prescription and approved the shoes, that before the shoes were accepted they had to be approved by the doctor. So I do not see how this can go to any of the material elements of this case. Whether he made a plaster cast or did not make a plaster cast of this man's [295] foot, whether it was required or not required, it was not for Tomsone or this witness to determine but was for the doctor, under the testimony here, to determine.

Mr. Sullivan: Your Honor, it was a requirement under the contract.

The Court: If the doctor accepted the shoes without a plaster cast, why that apparently was his prerogative, at least that is the testimony here.

Mr. Sullivan: All right, your Honor.

The Court: So I do not believe that that line of testimony would be admissible.

(Testimony of Allen E. Curry)

Mr. Sullivan: I will not pursue it any further in view of your Honor's ruling.

I have no further questions of this witness.

Cross Examination

By Mr. Neukom:

Q. What did you say you belonged to?

A. Veterans of Foreign Wars of the United States.

Q. What else?

A. Military Order of the Cooties, Honorary Degree of the Veterans of Foreign Wars.

Q. What else? A. I am a jeweler.

Q. You had an argument with Mr. Tomsone some time ago because you wanted him to make you two-tone shoes, didn't [296] you? A. No, that is not true.

Q. Didn't you ask him to make you some two-tone shoes? A. No; never.

Q. In fact, you asked him to make black and white shoes?

A. I never asked him to make two-tone shoes.

Q. You don't like Mr. Tomsone?

A. I have nothing against the man personally.

Q. Will you tell me where his place of business is?

A. On West Seventh Street.

Q. How long have you known it to be there?

A. Well, for the past—I knew him out in Southgate when he was out there and he came down here. I don't recall when he moved down here at all.

Q. Have you been in his shop on West Seventh Street?

A. Yes, plenty of times.

Q. What is its address?

A. I couldn't tell you the address. I know where it is at.

(Testimony of Allen E. Curry)

Q. Will you tell me one person in that community who has discussed with you Mr. Tomsone's reputation for truth and honesty?

A. The man in the drugstore there. I went in there one day when Mr. Tomsone made an appointment with me and re- [297] fused to keep it, because he was very conveniently absent at that time, and I went in to get a cup of coffee while I was waiting for Mr. Tomsone, and he asked me what I was doing in the neighborhood there. We got to talking and I said, "I am going over here to Hubert's shoe company to get a pair of shoes."

He said, "He is not very well liked, is he?"

I said, "Well, I don't know. What makes you think that? After all, I never condemn a person until I am sure."

And he said, "Well, after all, I sit in here and I see veterans come in here to wait for him, and he makes appointments and never shows up. He makes them a lot of rash promises and never intends to keep them. My own experience is—"

Q. Just a moment. I asked you about the druggist. What is this druggist's name?

A. I don't know the man. Just from walking in and sitting down and getting a cup of coffee.

Q. When did this take place?

A. This took place when I was getting this pair of shoes made.

Q. About what was the date?

A. I have no idea what the date was. It is about a year ago or so.

(Testimony of Allen E. Curry)

Q. Then this druggist told you that he wouldn't believe Mr. Tomsone, that Mr. Tomsone was not honest and was [298] not truthful?

A. He said he made a lot of promises, and veterans would come in there a lot of times.

Q. You had never seen this druggist before?

A. I had never seen him in my life.

Q. And you started right away to talk about Mr. Tomsone's reputation?

A. We didn't start talking about it right away, no. I walked in there to get a cup of coffee and then we got in the course of a conversation.

Q. As a matter of fact, you were pretty irked then at Mr. Tomsone, weren't you?

A. No, not necessarily.

Q. You didn't like him very well, did you?

A. Except that we had a lot of arguments, the same as I have with a lot of shoe men who I have had arguments with.

Q. Oh, you have had arguments with other shoe men?

A. Definitely.

Q. Then Mr. Tomsone isn't the only one?

A. That is right.

Q. In fact, you have had arguments with a lot of people in your life, haven't you?

A. Yes, that is right.

Mr. Neukom: That is all.

Mr. Sullivan: That is all. [299]

The Court: Mr. Witness, is this the only pair of shoes Mr. Tomsone ever made for you?

The Witness: No, sir.

The Court: How many other pairs has he made?

(Testimony of Allen E. Curry)

The Witness: At Wood's Shoe Company I believe he made three pair of shoes before he got one that I could put on my feet to wear across the room.

The Court: How many pairs has he made for you?

The Witness: That is the extent of it.

The Court: For how long a time?

The Witness: That is about since '37 or '38.

The Court: You have been wearing his shoes ever since?

The Witness: No. I have shoes made on other contracts.

The Court: Very well. Step down.

(Witness excused.)

The Court: Next witness.

Mr. Sullivan: Mr. Kancheff.

### CARL KANCHEFF,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Carl Kancheff.

The Clerk: How do you spell your last name?

The Witness: K-a-n-c-h-e-f-f.

The Clerk: Your address? [300]

The Witness: 320 South Fremont Avenue.

The Clerk: Where?

The Witness: Los Angeles.

The Clerk: Take the stand.



(Testimony of Carl Kancheff)

Direct Examination

By Mr. Sullivan:

Q. What is your business or occupation, Mr. Kancheff?

A. I am an apprentice jeweler.

The Court: Speak a little louder, if you can.

The Witness: I will try:

Mr. Sullivan: His answer was apprentice jeweler.  
Try and keep your voice up so the jurors may hear you.

Q. Are you acquainted with Mr. Hubert Tomsonsone?

A. Yes, I am.

Q. How long have you known Mr. Tomsonsone?

A. I can't be definite, but close to a year.

Q. During the past year approximately?

A. Yes.

Q. Are you acquainted with other people that know him in this community?

A. I have talked to other veterans that know him.

Q. Are you familiar with his general reputation for truth, honesty and integrity in the community in which he resides or has his business?

A. Well, does that take in Sawtelle and that area or [301] just in the local community?

Q. He does business out at Sawtelle, doesn't he?

A. Yes, I am.

Q. What is it, good or bad? A. Bad.

Q. Would you believe him under oath? A. No.

Mr. Sullivan: That is all.

The Court: Cross examine.

(Testimony of Carl Kancheff)

Cross Examination

By Mr. Neukom:

Q. What is your name? A. Kancheff.

Q. Until an investigator from Mr. Sullivan's office came and talked to you and asked you whether or not you would be a witness, you hadn't given this type of matter very much thought, had you, Mr. Kancheff?

A. I had given it very much thought.

Q. You were not subpoenaed to come here?

A. I was subpoenaed.

Q. You were not talked to before you came here?

A. I ran into the investigator quite by chance.

Q. You ran into him by chance? A. Yes.

Q. That was because you had some hard feeling against [302] Mr. Tomsone that you wanted to come here and testify?

A. At first it had nothing to do at all with Mr. Tomsone.

Q. What did it have to do with?

A. I was thinking of going into the Veterans of Foreign Wars.

Q. A little louder, please.

A. I was thinking of going into the Veterans of Foreign Wars, and while talking to Mr. Curry I met Mr. Sullivan.

Q. Mr. Curry is the one that asked you to come down and testify?

A. No one asked me to come down and testify. I volunteered to testify.

Q. You volunteered? A. Yes.

(Testimony of Carl Kancheff)

Q. Now isn't it true that unfortunately because of your ailments that you weren't able to walk until Mr. Tomson made you some pairs of shoes?

A. I was walking just as well before I got the shoes as after.

Q. He has made you two pair of shoes?

A. He has made me two pair of shoes; yes.

Q. And both of those shoes that you received were approved by the doctor before you accepted them, weren't they?

A. Not to my knowledge. [303]

The Court: You mean you don't know?

The Witness: I really don't know.

By Mr. Neukom:

Q. You are wearing a pair of them today, aren't you?

A. Yes, I am.

Q. Do you know where Mr. Tomson's business is?

A. Yes, I do.

Q. Do you know anyone in that neighborhood that you have ever discussed his reputation with?

A. No, I have never been in that neighborhood except to go to his shop.

Q. You have only known him for a year?

A. That is about right.

Q. You don't know where he lives, do you?

A. No, I don't.

Q. Do you know anyone in the neighborhood where he lives that has ever discussed his reputation with you?

A. No.

Q. Mr. Kancheff, isn't it true that you are just a little bit irked, and for that reason you are saying that Mr. Tomson shouldn't be believed?

A. I can give a very good reason.

(Testimony of Carl Kancheff)

Q. Has anybody told you they wouldn't believe Mr. Tomsone excepting Mr. Curry?      A. Yes. [304]

Q. Who besides him?

A. Other veterans I have talked to at Sawtelle.

Q. They have come forward and told you, you just started to talk about your not going to believe Mr. Tomsone, is that right?      A. No.

Q. Isn't it true that frequently veterans who have a lot of time on their hands frequently gripe a lot?

A. That is true in the army and among veterans.

Q. And this was just the usual gripes that you have about the whole spirit of the thing, isn't that right?

A. No.

Q. Isn't it true, Mr. Kancheff, that it is kind of inconvenient to have to go all the way out there to Sawtelle and to have to wait around and wait your turn and as a result of that you get irked and you take your blames out on anybody that comes into your mind?

A. I wouldn't say that.

Mr. Neukom: That is all.

Mr. Sullivan: That is all.

The Court: Mr. Tomsone made the first pair of shoes you had?

The Witness: Yes, he did.

The Court: Up to that time you had to wear bedroom slippers? [305]

The Witness: Yes, sir.

The Court: So nobody else has ever made any shoes for you?

The Witness: No, sir.

The Court: You may be excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Sullivan: Has Mr. Nie come in? (No response.)

The Court: No one responded.

Mr. Sullivan: Is Mr. Chapman here?

LEICESTER C. CHAPMAN,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: L. C. Chapman.

The Clerk: What is your first name?

The Witness: Leicester; L-e-i-c-e-s-t-e-r.

The Clerk: Your address?

The Witness: Veterans Administration, Los Angeles.

Direct Examination

By Mr. Sullivan:

Q. Mr. Chapman, what is your business or occupation, please?

A. I am manager of the Regional Office of the Veterans Administration in Los Angeles. [306]

Q. Is that the Veterans Administration commonly known as Sawtelle? A. No, sir.

Q. Are you downtown? A. Partially.

Q. You also have an office out at Sawtelle?

A. Yes, sir.

Q. You spend part of your time in the downtown office and part of your time out there, is that correct?

A. Yes, that is correct.

Q. And during the month of October 1946 were you spending part of your time downtown and part out there?

A. That is right.

(Testimony of Leicester C. Chapman)

Q. How much of your time did you spend downtown during the month of October 1946?

A. I have no idea.

Q. Was it your practice to spend certain days in the Sawtelle office and certain days downtown, or did you spend parts of each day at each office?

A. Sometimes I was all day at one place, sometimes all day at the other, and sometimes in between.

Q. Sometimes you would be in one place part of the day and the other place part of the day?

A. That is right.

Q. Do you recall whether you were at your office on [307] October 18, 1946? Does that date mean anything to you?

A. No, sir.

Q. You have no independent recollection of that particular date?

A. No, sir.

Q. Directing your attention to Dr. Gage, the gentleman seated at the counsel table here, are you acquainted with him?

A. Yes, sir.

Q. Do you know approximately when you first became acquainted with Dr. Gage?

A. I couldn't give the date. He came to my office to see me. I believe it was early in October.

Q. Do you recall when he came to your office he had with him a written request for resignation?

A. He said he had. I did not see it. I don't remember.

Q. You didn't actually see the papers then?

A. I don't recall seeing them; no sir.



(Testimony of Leicester C. Chapman)

Q. You don't recall today having seen them at that time?

A. My recollection is that during the conversation he reached for them in among some other papers and I don't know whether he said he had them or whether he left them.

Q. Did you have some discussion with him that time about his wanting to resign?      A. Yes, sir. [308]

Q. Can you recall what was said by him or by you at that time?

A. He said quite a good deal. Generally I think it was to the effect that he was thinking of resigning, in fact, had signed his resignation, I believe he said, but that he wanted to talk to me about it before submitting it, and I believe finally he said that he liked the work and would like to stay in it, and I suggested in that case that he not resign.

Q. Do you recall anything else that was said at that time?

A. Yes. He talked to me about some of this difficulties with other doctors, I believe. I recall one particular thing he said was that all cases were referred to him, that if anything involving a bone in it they called the orthopedist and sent it to him, and he told me about a case that some other doctor had been treating for some time, not knowing what was the matter with the man, and when he finally sent him to him he discovered he had a sarcoma of the knee. I don't remember whether he said he operated or had somebody else operate or what was done about it.

He talked to me at length about the orthopedic contracts, particularly I believe with reference to legs and arms. He spoke of the Milligan Company and their rep-

(Testimony of Leicester C. Chapman)

representative, Mr. Brown I believe, and his effort to get those people to put on display at our place samples of their products in order that [308] the men might be able to make a selection without having to go all over Los Angeles.

He mentioned one case which I took note of and had investigated later, having to do with a man, I believe, who had a leg made by someone other than Milligan and claimed that he was told by the clerk in the orthopedic office that the repair of that leg would have to be made by Milligan, and the man apparently objected to that. There were probably one or two other specific complaints mentioned, I believe. I believe he mentioned the fact that he had of necessity turned down some men for orthopedic shoes, I believe, who previously had been getting or wearing shoes and that in so doing he was saving the Government a good deal of money out of it all.

Q. Do you remember whether he mentioned the party's name?

A. I might add that he stated that he felt that the previous authorizations for those shoes were not proper. In other words, many men were wearing orthopedic shoes who should have had insoles or something of that kind.

Q. Well, as a result of his conversation with you, did you state anything to the effect that he would think the matter over further?

A. That was my understanding when he left, was that he was not going to resign immediately.

Q. Was that the only time, as you now recall, that he [309] ever came and talked with you there?

A. Yes. I have seen him but not in my office.

(Testimony of Leicester C. Chapman)

Q. You think that was the only time that he ever came to your office, as far as you recall?

A. That is right.

Mr. Sullivan: Thank you, Mr. Chapman.

The Court: Cross examine.

Mr. Neukom: Your Honor, I have subpoenaed Mr. Chapman and the defense subpoenaed Mr. Chapman. Maybe we can let him go tonight if I can go over my notes.

The Court: You mean you are not going to finish this case tonight? How many witnesses have you left?

Mr. Sullivan: This will be my last one.

Mr. Neukom: I may go into matters that would not be proper matters of cross examination.

Mr. Sullivan: I won't object if you do. I won't confine you to the cross examination of his direct testimony, as far as I am concerned.

### Cross Examination

By Mr. Neukom:

Q. This Milligan contract for legs and arms, this wasn't Tomsone's contract, was it? A. No, sir.

Q. That is a special deal entirely, wasn't it?

A. Oh, yes. [310]

Q. During the conversation, Mr. Chapman, do you remember whether or not Dr. Gage made any mention of Mr. Tomsone having put his check book on his desk and telling you about that incident? A. No, sir.

Q. During the conversation with you, Mr. Chapman, did Dr. Gage make any complaint as to the quality or character of the work being performed by Mr. Tomsone?

The Court: What was the answer?

The Witness: No, sir.

(Testimony of Leicester C. Chapman)

By Mr. Neukom:

Q. There has been some testimony here by Dr. Gage to the effect that you told Dr. Gage that a doctor had committed suicide as a result of an investigation being conducted at the Facilities. Did you so state to Dr. Gage when you were talking to him? A. No, sir.

Q. Just what did you say, if anything, with regard to any such incident?

A. We were discussing the Milligan and the other arm and leg contractors, and Dr. Gage, in the course of the conversation, indicated that as a result of Mr. Brown, who represented Milligan, refusing to agree to this plan I mentioned a while ago of putting their product on display at our place, that Dr. Gage indicated that he thought as a re- [311] sult of that, and some other things, that there was something maybe wrong in connection with the Milligan contract, the amount of work they got as compared to others, I believe.

At that time I mentioned the fact to Dr. Gage that sometime in the past, when I was stationed here for six years, that question had continuously arisen, we had investigated it repeatedly, and we had never been able to get any definite facts on the matter; and mentioned, I believe, that the last doctor who had been under investigation in connection with the matter had subsequently been transferred to Florida, and I had heard since my return that he had committed suicide.

Q. That was an incident that occurred a number of years ago?

A. I have heard since I came back. I don't know when it happened.

(Testimony of Leicester C. Chapman)

Q. So it is clear then that the arms and legs have nothing to do with the foot contract, the Milligan and the foot contract with Tomsons are entirely distinct?

A. That is my understanding.

Mr. Neukom: That is all.

Mr. Sullivan: That is all. Thank you, Mr. Chapman.

(Witness excused.)

Mr. Sullivan: Might we have one other short witness?

The Court: All right.

Mr. Sullivan: Dr. Townsend. [312]

KENNETH TOWNSEND,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Kenneth Townsend.

The Clerk: Your address?

The Witness: 9949 Santa Monica Boulevard, Beverly Hills.

The Clerk: Take the stand.

Direct Examination

By Mr. Sullivan:

Q. What is your business or profession, Doctor?

A. Physician and surgeon.

Q. Where do you reside?

A. I reside at 712 North Fairfax in Los Angeles, my business being in Beverly Hills.

Q. Are you acquainted with Dr. Theodore Gage, the gentleman seated at the counsel table? A. I am.



(Testimony of Kenneth Townsend)

Q. How long have you known Dr. Gage?

A. Approximately a year.

Q. Were you acquainted also with other people that know him in the vicinity in which he lives?

A. I am.

Q. Are you familiar with his general reputation for honesty and integrity and as a law-abiding citizen? [313]

A. I am.

Q. Is it good or bad?

A. To my knowledge it is good.

M. Sullivan: Thank you. That is all.

Mr. Neukom: That is all.

The Court: You may be excused.

(Witness excused.)

Mr. Sullivan: Your Honor, I have found that Dr. Nie has come into the courtroom.

ARTHUR J. NIE,

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Arthur J. Nie; N-i-e.

The Clerk: Your address?

The Witness: 1050 Marco Place, Venice.

The Clerk: Take the stand.

Direct Examination

By Mr. Sullivan:

Q. Mr. Nie, what is your business or occupation, please?



(Testimony of Arthur J. Nie)

A. I am medical administrative officer of the Medical Division of the L. A. V. A. Regional Office.

The Court: What is the "V. A."?

The Witness: Veterans Administration. [314]

By Mr. Sullivan:

Q. Located at Sawtelle? A. That is right.

Q. How long have you been employed there in that capacity? A. Since August 29 of this year.

Q. Were you employed there in that capacity during the month of October 1946? A. I was.

Q. Now in connection with your employment there, did you become acquainted with Dr. Theodore Gage, the gentleman seated at the counsel table over here?

A. I did.

Q. Did you ever have any conversation with Dr. Gage in respect to his wanting to resign?

A. Yes, on at least two occasions.

Mr. Sullivan: May we offer in evidence this Defendant's Exhibit A, your Honor?

Mr. Neukom: I have no objection.

The Court: Admitted.

(The document referred to was received in evidence and marked Defendant's Exhibit A.)

By Mr. Sullivan:

Q. I will show you, Mr. Nie, Defendant's Exhibit A which purports to be a form of written request for resignation. [315]. Is that the form that is used out at the Veterans Administration there?

A. That is the proper form.

Q. And is this your signature, Arthur J. Nie?

A. That is my signature.

(Testimony of Arthur J. Nie)

Q. And the date here, October 2, 1946, you observe that date?      A. Yes.

Q. Did you have some discussion with Dr. Gage on or about that date in relation to his contemplated resignation?

Mr. Neukom: Your Honor, I am going to object to any additional testimony.

Mr. Sullivan: I won't ask him. I am not going into the nature of the conversation. I just want—

The Witness: Would you repeat the question?

The question referred to was read by the reporter, as follows:

("Q. Did you have some discussion with Dr. Gage on or about that date in relation to his contemplated resignation?")

By Mr. Sullivan:

Q. (Continued) Just answer it yes or no.

A. Yes.

Q. As a result of your discussion with him, did you make any suggestion to him that he talk to anyone else about the matter? [316]

A. Dr. Gage asked what the procedure was. I told him that the next procedure for him to do was to go to employee relations, which is the routine procedure. A discussion came up as to whether he might see the manager, and I advised him that I had been told that the manager had an open-door policy with all employees, and that any employee that wanted to see the manager could see the

(Testimony of Arthur J. Nie)

manager, and it was my understanding that he was going over to personnel after this discussion.

The Court: Is that all the conversation?

The Witness: On that particular date.

The Court: About this subject?

The Witness: Of resigning?

The Court: Of resigning.

The Witness: On that particular date we talked probably for 5 or 10 minutes, but I don't recall anything particular in our conversation other than the discussion as to what he was entitled to do and what he was authorized to do in relation to submitting a resignation, which he told me he wanted to submit.

By Mr. Sullivan:

Q. Did you send him then from your office to see him?

A. He was advised to go to the V. A. Regional Office, that is our offices in the Wadsworth General Hospital, and he was advised to go over to the Regional Office, which is several blocks away on Sepulveda. [317]

Mr. Sullivan: That is all I have.

Mr. Neukom: No questions.

(Witness excused.)

Mr. Sullivan: We will rest.

The Court: The defendant rests.

Any rebuttal?

Mr. Neukom: Yes, your Honor.

Dr. Long, please.

FRANK L. LONG,

recalled as a witness by and in behalf of the Government in rebuttal, having been previously duly sworn, resumed the stand and testified further as follows:

The Court: You have been sworn before?

The Witness: Yes, sir.

## Direct Examination

By Mr. Neukom:

Q. Dr. Long, at any time that Dr. Gage talked to you did he in any of those conversations report to you that the work done by Mr. Tomsone was inferior and of poor quality?

A. He did not. His point was that they should have another contract so a fellow would have a choice of more than one. He never complained about the particular work that I can recollect.

Q. Any time that Dr. Gage talked to you, did he tell you that Mr. Tomsone was making approaches to him that he [318] thought were irregular?

A. He never discussed that with me at all.

Q. At any time that he talked to you, did he ever tell you that Mr. Tomsone had offered to allow him, Dr. Gage, to make out a check?

A. I never heard of it. He never did.

Q. Was there any discussion that Mr. Tomsone had ever offered him a check?

A. No, sir; there was none.

(Testimony of Frank L. Long)

The Court: Or money?

The Witness: There was none.

By Mr. Neukom:

Q. Did you talk to him upon more than one occasion, Dr. Long, while he was there?           A. Who was that?

Q. Dr. Gage.

A. Yes, he come to me on one other occasion about the leg contracts.

Q. We won't go into that.

A. I know, but he talked about that and we had some discussion about that on two or three occasions.

Q. Is your office available to him if he cared to discuss anything with you?

A. The door is always open; it is never closed.

Q. Was that true during the month of October? [319]

A. It was.

Q. And you were at the Facility, to the best of your recollection, each of the open days during the month of October?

A. I might have visited one of the other sub-regional offices during that month, I am not sure. I think it was September though, and I believe I was there every day of October.

Mr. Neukom: That is all.

Mr. Sullivan: I have no questions.

(Witness excused.)

Mr. Neukom: Mr. Davis, will you take the stand?

## HOWARD H. DAVIS,

called by and in behalf of the Government in rebuttal, having been previously duly sworn, resumed the stand and testified further as follows:

## Direct Examination

By Mr. Neukom:

Q. After you had arrested Dr. Gage, about what *your* was it when you started from Sawtelle towards the FBI?

A. I would say approximately 3:50 to 4:00 o'clock.

Q. And Sawtelle is about 17 miles or more from the FBI office at Fifth and Spring?

A. Somewhere between 15 and 17 miles, I would say.

Q. And you drove in there?

A. We drove in; that is right. [320]

Q. Dr. Gage was taken to the office? A. Yes.

Q. Did you accord him the opportunity of using the telephone?

A. He said he would like to use the telephone, and he was so allowed.

Q. Did he call more than one person while you were there? A. I know of two calls that he made.

Q. Did he discuss or state to you that he had received a call from Mr. Ward Sullivan while he was there?

A. I don't believe he received one from him. Mr. Malloy received one.

Q. While he was at the office, did you hear his end of the conversation talking to one by the name of Sally?

A. I did.

Q. Prior to that, had he stated whom he wished to call? A. His wife, at the William Tell Motel.

Q. Did a call come through?

A. That is correct.



(Testimony of Howard H. Davis)

Q. You didn't hear who was on the other end of the line?

A. I couldn't hear what was being said on the other end of the line.

Q. What did you hear Dr. Gage say, if anything? [321]

A. He started out by telling his wife that he had been arrested by the FBI and not to get excited, and then while apparently the other person was talking, after that he said, "Yes, I took that money." Then there was more conversation apparently between the two—I could not understand both ends of it naturally—and he said, "I can't tell you that over the phone."

Q. When he was arrested, when you entered the room where Dr. Gage was just prior to the finding of the money, what badge, if any, did you show?

A. The regular Bureau badge, the Bureau badge which I have carried for some time, ever since I have been in the service of the Federal Bureau of Investigation.

Q. Does it say on it "Federal Bureau of Investigation, Department of Justice"? A. It does.

Q. Did you have any Forestry badge with you?

A. I am unauthorized to carry any badge—

Q. My question was, did you have one.

A. I did not.

Mr. Neukom: I don't wish to take this away, and with the consent of the Court I would like to read from it. Is there any objection?

Mr. Sullivan: I have no objection.

Mr. Neukom: "Federal Bureau of Investigation, United [322] States Department of Justice."

(Testimony of Howard H. Davis)

I would put it in evidence, but I thing this gentleman may need it for his duties.

That is all.

Mr. Sullivan: I have no questions.

The Court: You are excused.

(Witness excused.)

The Court: Next witness.

Mr. Neukom: Mr. Duncan, please.

CHARLES M. DUNCAN,

called as a witness by and in behalf of the Government in rebuttal, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Neukom:

Q. Mr. Duncan, in the course of your investigations on this Gage matter, did you have occasion to observe Dr. Gage on or about October 10, 1946 in the shoe shop, or the shop of Hubert Tomsons at 1207, I believe it is, West Seventh Street, Los Angeles? A. Yes, I did.

Q. Just relate what you saw, about what time of the day it was and what you saw.

A. I arrived at Mr. Tomsons's shop at approximately 10:00 or 10:15 a. m., and at approximately 11:00 a. m. Dr. [323] Gage entered the shop with Mrs. Gage.

Q. With Mrs. Gage, his wife? A. Yes, sir.

Q. Is that the only occasion you saw them there?

A. Yes.

Mr. Neukom: That is all.

Mr. Sullivan: I have no questions.

(Witness excused.)

Mr. Neukom: Mr. Harder.

JOHN HARDER,

called as a witness by and in behalf of the Government in rebuttal, being first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: John Harder; H-a-r-d-e-r.

The Clerk: Your address?

The Witness: 1423 Ridgeway.

Direct Examination

By Mr. Neukom:

Q. Do you know Mr. Tomsone? A. I do.

Q. How long have you known him.

A. About eight years.

Q. Whereabouts?

A. Socially. His wife is employed by me and we have [324] known each other socially, going out together on double dates, our wives and ourselves and friends. We have been at each other's homes off and on during the last eight years.

Q. Has that occurred of late, the last few years?

A. Yes, it has.

Q. Do you know the general reputation—by the way, where is your business?

A. On 720 South Hill Street.

Q. Do you know where Mr. Tomsone's place of business is? A. I do.

Q. And that is about 1207 West Seventh Street?

A. That is right.

Q. Is that a few blocks away from your place of business? A. About five or six blocks.

(Testimony of John Harder)

Q. Do you know Mr. Tomsons's general reputation—

A. I do.

Q. Just allow me to finish, please.

A. Pardon me.

Q. —for truth and honesty and integrity, first in the community in which he lives?

A. I don't know the community in which he lives.

Q. All right. In the business community.

A. One person that he does business with. [325]

Q. Do you know his reputation?

A. I have heard this person express it.

Q. What is his reputation for truth, honesty and integrity?

A. He told me he was a pretty good man to do business with.

The Court: You can answer the question as to whether it is good or bad.

The Witness: It is good.

Mr. Neukom: That is all.

#### Cross Examination

By Mr. Sullivan:

Q. Mr. Harder, you say that you have known Mr. Tomsons for about a year?      A. About eight years.

Q. And that you and your wife and Mr. Tomsons and his wife go out socially quite often?      A. We have.

Q. Is that right?      A. That is right.

Q. But you are not familiar with his reputation for truth, honesty and integrity in the community in which he

(Testimony of John Harder)

resides, but you are familiar with it in the community in which he does business, is that correct?

A. I know one person that he does business with. [326]

Q. Just one? A. Yes. That is a friend of mine.

Q. Who is that?

A. He is the owner of a leather company, or one of the partners in Wyckoff Leather Company.

Q. What is his name?

A. Willard Bitner, B-i-t-n-e-r.

Q. Is he the only person that you know who has done business with Mr. Tomsone?

A. As far as I know, yes.

Q. And was it from Mr. Bitner that you learned what Mr. Tomsone's reputation for truth, honesty and integrity was? A. I have heard him express it; yes.

Q. You have heard Mr. Bitner express it?

A. Yes.

Q. Were you discussing Mr. Tomsone with Mr. Bitner? A. I think it was brought up; yes.

Q. Do you know whether it was or was not?

A. It was.

Q. Where was the occasion of discussing Mr. Tomsone with Mr. Bitner?

A. Mr. Bitner has been recently in the leather business and he is a close friend of mine, and I said, "Did you ever do any business with Hubert?" and he said, "I have occasionally, yes." [327]

Q. What else did he say about that?

A. And I said, "How come you don't sell any more stuff?"

(Testimony of John Harder)

He said, "We don't have too much of what he wants."

I said, "Do you get along with him?"

He said, "Yes."

Q. Did you say anything else?

A. That is all that I remember.

Q. That was all that was said about him?

A. Yes.

Q. You had no further discussion with Mr. Bitner about Mr. Tomsone?

A. Other than he knows Mr. Tomsone also in a friendly way. We discussed friends. We talked about him.

Q. But you have now told us as near as you can recall everything that was said between yourself and Mr. Bitner in relation to Mr. Tomsone's reputation for truth, honesty and integrity, is that correct?

A. In a business way; yes.

Q. And you haven't discussed that with any other person that he does business with?

A. I don't know anyone else that he does business with.

Mr. Sullivan: That is all.

#### Redirect Examination

By Mr. Neukom:

Q. When I state "community" to you in asking you, you [328] have known friends of Mr. Tomsone here in Los Angeles?      A. I have what?

Q. You have known friends of Mr. Tomsone's in Los Angeles?

A. Yes, I have. I thought you meant where he lives.



(Testimony of John Harder)

Q. We will consider Los Angeles a community.

A. Yes.

Q. Not just the actual home place. You have known people that know him intimately? A. Yes.

Q. Is his general reputation among those people for truth, honesty and integrity good or bad? A. Good.

Q. Have you ever heard anyone discuss unfavorably his reputation? A. I never have.

Mr. Neukom: That is all.

Recross Examination

By Mr. Sullivan:

Q. Who among his friends have you heard discuss his general reputation for truth, honesty and integrity?

A. We have never brought it up as an issue; no.

Q. You have never discussed it with any of his friends?

A. We have discussed Hubert and we would say, "He is a pretty nice fellow." [329]

Q. They say he is a pretty nice fellow? A. Yes.

Q. But you never discussed with any of his friends his reputation for truth, honesty and integrity?

A. I never asked anyone in those words; no. I usually don't do that with my friends.

Mr. Sullivan: That is all. No further questions.

The Court: You may be excused.

(Witness excused.)

Mr. Neukom: Pete Latora.

## PETE LATORA,

called as a witness by and in behalf of the Government in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Pete Latora; L-a-t-o-r-a.

The Clerk: Your address?

The Witness: 1835 West 88th Place.

The Clerk: Take the stand.

## Direct Examination

By Mr. Neukom:

Q. How long have you known Mr. Tomsone?

A. About 12, 13 years.

Q. Have you known him intimately?

A. Yes. [330]

Q. Here in Los Angeles? A. Yes.

Q. Have you known him socially? A. Yes.

Q. Have you know him well in the last few years?

A. Very well; yes.

Q. Have you gone out with friends of his?

A. Most with his family, his wife and him.

Q. Do you know other friends of his?

A. Yes, sir.

Q. Do you know people with whom he does business?

A. Well, leather houses; yes.

Q. What business are you in?

A. Right now I am in a used car lot, salesman.

Q. Were you formerly in any other business?

A. Yes, shoe repair business.

(Testimony of Pete Latora)

Q. Did you work with Mr. Tomsone?

A. Well, I did about three or four years ago, just parttime.

Q. Did you work with concerns that he did business with?      A. No.

Q. Do you know his general reputation in this community of Los Angeles for truth and honesty?

A. Yes. [331]

Q. What is it?      A. Good.

Q. Have you ever heard his reputation for truth and honesty discussed in an unfavorable way?

A. No, sir.

Mr. Neukom: That is all.

Cross Examination

By Mr. Sullivan:

Q. With whom have you ever discussed Mr. Tomsone's reputation for truth and honesty?      A. Yes.

Q. Whom did you ever talk it over with?

The Witness: Talked about his business, you mean?

The Court: No, his reputation.

By Mr. Sullivan:

Q. His reputation for truth and honesty, did you ever talk to anybody about that?

A. Leather houses that I used to do business with.

Q. What are the people's names?

A. Russo Leather Company.

Q. Who did you talk to down there?

A. To the man himself.

Q. What is his name?      A. Russo, Alfred Russo.

(Testimony of Pete Latora)

Q. When did you talk to him about Mr. Tomsone? [332]

A. Oh, when I used to have my shop.

Q. How long ago was that?

A. About six or seven months ago.

Q. What did you say to Mr. Russo about him, or Mr. Russo say to you about Tomsone's reputation for truth and honesty?

A. He says he is an honest man.

Q. How did you happen to be talking to Mr. Russo about whether Mr. Tomsone was an honest man or not?

A. I had asked him, "How's Hubert?" He said, "He is doing all right." I said, "He is a nice fellow."

Q. What did he say? A. He said he is.

Q. Is that all he said? A. That is right.

Q. You asked him, "How's Hubert doing," and he said, "He is doing all right," and you said, "He is a nice fellow," and Mr. Russo said, "Yes"?

A. That is right.

Q. That is all you said about him to Mr. Russo?

A. That is right.

Q. Did you talk to anybody else about him?

A. No, sir.

Q. He is the only man?

A. Also other friends that we have. [333]

Q. Who are they?

A. A fellow named Sam Grayko.

(Testimony of Pete Latora)

Q. What did Mr. Grayko say to you about Mr. Tomisone?

A. We talked, he has been friends of our family for a long time.

Q. What did he say about him?

A. We talk about social things, not business.

Q. About social functions? A. Yes.

Q. Going out to dances? A. Get-togethers.

Q. His talk about him was about going together for a social evening, is that right? A. That is right.

Q. That is true about all the people you have talked to about him? A. That is right.

Mr. Sullivan: Nothing further.

The Court: Witness excused.

(Witness excused.)

The Court: Next witness.

Mr. Neukom: The Government rests.

Mr. Sullivan: We have nothing further.

The Court: Both sides rest.

Do you want to argue this tonight? [334]

Mr. Neukom: It is immaterial to me.

Mr. Sullivan: I would prefer to argue it tomorrow morning.

The Court: Recess until 9:30 tomorrow morning. Remember the admonition.

(Whereupon, at 4:50 o'clock p. m., an adjournment was taken until 9:30 o'clock a. m., December 13, 1946.) [335]

Los Angeles, California, December 13, 1946, 9:30 o'clock a. m.

The Court: United States v. Gage.

Mr. Sullivan: Ready.

Mr. Neukom: Ready.

The Court: Usual stipulation, gentlemen?

Mr. Neukom: Yes, your Honor.

Mr. Sullivan: Yes, your Honor.

The Court: Mr. Neukom.

Mr. Neukom: Your Honor, would the Clerk read the indictment rather than have me read it?

(At this point the indictment was read by the Clerk.)

#### Opening Argument in Behalf of the Government

Mr. Neukom: May it please your Honor, counsel for the defense, ladies and gentlemen of the jury: It now becomes my duty to discuss with you and try to explain to you the logical interpretation of the evidence in this case. I have a duty to perform which I wish to perform fairly and honestly. Dr. Gage had a duty to perform. Whether he performed that duty as charged in this indictment is a matter for you to decide from the evidence.

In all cases of where a person is charged with a crime, it is the duty of the Government to prove beyond a reasonable doubt the guilt of the person accused in accordance with the allegations or charges of the indictment. Now you will hear [337] considerable on that phrase, "reasonable doubt." I dare say counsel for the defense will argue that to you at great length. His Honor will give you an interpretation of what reasonable doubt means.



In my discussion of the evidence or anything that I say to you, as I talk, you should disregard my interpretation if it does not conform with the evidence that has come to you from the witness stand. Your recollection is the thing that you should be guided by. Any evidence which has been stricken and his Honor has told you to disregard, wipe it from your minds as if you had never heard it.

But going back to "reasonable doubt," and my discussion is not the law of this case, it is only my belief, the law comes to you entirely from the court.

I like to think of what a very elderly gentleman who used to come here quite often—he has now gone the way of all men—after he had given the definition of reasonable doubt as is generally given, he used to turn and sort of ad lib to the jury and say, "It just means good horse sense."

In other words, you must have an abiding conviction—and that is your duty to this defendant, to have an abiding conviction—to a moral certainty that you believe the Government has proved its case. But you have also a duty that when you believe the Government has proved its case, you should find the defendant guilty. [338]

There is nothing I dare say in human life that can ever be proven to a mathematical degree of certainty. We are all just human beings. But considering it in the manner in which you would the more weighty things of your life, giving the Government all that it deserves, giving the defendant all he deserves, then you should decide this case accordingly.

Ladies and gentlemen, sympathy has often been brought into play in the defense of any case. Sympathy is wonderful. Faith, hope and charity, and the greatest of these is

charity. We are all considerate of, and feel sorry for, anybody who is charged with crime. But remember that we are all free agents, and if we see fit to place ourselves in a position whereby the hand of guilt points towards us we do it voluntarily and we should not come and ask for sympathy. In your deliberations sympathy has nothing to do with the case.

Now let us go to some of the evidence in this case.

It is often a device that is used in the defense to try to try every issue other than the issue which is really before you. Smog, just smog.

The matter pertaining to this contract here had really nothing to do with this case. The only issues that you are really to decide is whether or not Dr. Gage did ask for, on or about October 3rd, from Mr. Tomsone, who had the contract, a sum of money, \$100 or any sum of money, with the intent of having it influence his decision.

The second count is, did he on or about October 18th re- [339] ceive \$100, a gratuity, with the intent on his part that it was going to influence his decision.

Isn't it rather unusual that after this conversation had taken place in the Mayfair Restaurant that 12 orders of shoes went through? I don't recall, but I don't think there was a specific denial of that in this case.

Now intent, ladies and gentlemen—and these things may seem elementary; I do not mean to have them so seem—but intent is a state of mind. There isn't any way in the world that we can dissect a man's mind and find out where in his brain just what was his intent at any given time. We cannot X-ray a man's mind to find out that intent. We can and we should look to the evidence and

all the circumstances and all the logical deductions to ascertain just what was the intent at any given time.

Ladies and gentlemen, when you have \$100 given to you by a man that you feel was irregular, a man who was cheating the Government by poor construction of shoes, a man who had made overtures to you of irregularity, a man who, as he stated, had thrown his check book down on your desk and said, "Write your check," and when you accept that \$100 and put it in your left-hand pocket and you accept it out in a parking lot, close to a car, this man that he says tagged along behind him, this man that had been so irregular that he thought he was no good, and he had an opportunity to go and turn that money over to [340] his superiors—does he? I would have more believed his testimony had it been that that money was slipped into his pocket, that it was placed in there, that he didn't know about it until it was found. But he walks into his office, there was a patient in his office, 10 or 15 minutes go by before the FBI apprehends and arrests him, and they find him red-handed with this money in his pocket. And it has been identified here by three witnesses.

If that isn't intent, if that isn't taking money, I don't know what is. He certainly could write prescriptions for shoes. It was his duty. It was one of the most essential parts of his duty. But this man would have you believe that he was protecting the exchequer of the Treasury of the United States from faulty shoes. This man who has taken \$100 for corruption—corruption in public office—and I say, ladies and gentlemen, that is a bribe, and he accepted it. It would have been a mighty good thing to have been able to have gone along for every week getting \$100 a week.

Dr. Gage, when he went to work—and it is his own testimony—stated that he didn't intend to stay long. He had no intention of staying long. And yet we see a most unusual design or desire to look into this contract, a contract of a similar character which had been maintained with the institution for over four years, or nearly four years, but he, the great reformer, believes that this is all wrong. [341]

Why was he so interested in this contract? Doesn't the true interpretation of the facts lead to only one conclusion? Just like Mr. Tomsone testified, that Dr. Gage wanted to get the contract under a fictitious name.

Look at Mr. Tomsone. An endeavor has been made to paint him as a person who could not be believed. The great Mr. Curry, the man who belongs to so many posts or has been the head of so many posts, showed to you just as clear as anything that he had a biased, a griping attitude. Why he was the great complainer. He prided himself in complaining. He griped, griped, griped, and yet he wears this man's shoes.

Ladies and gentlemen, had the shoes that he had on that he was wearing made by Mr. Tomsone been defective, had there been anything particularly bad about them—and which is collateral to this case, hasn't a thing to do with this case—they would have showed you those shoes. You would have seen those shoes. That poor workmanship would have been called to your attention. But was it? No, because it isn't true. It is just smog, smog.

When you are caught red-handed you have one of two things to do, either admit it and take the consequences, or try to devise some sort of a story that you hope somebody

is going to believe. Ladies and gentlemen, these two people when they first met early in September didn't hit it off—conflicting personalities. Mr. Tomsone is a person of Latin [342] derivation. Probably he is quick-tempered at times and was disturbed maybe to see a new doctor out there, and Dr. Gage was new and he was a little disturbed at Mr. Tomsone. But their enmity didn't last. The next time they met they were friends. They apologized and they were apparently friends.

But what happens? The next time, or shortly after that, the entreaty, the offer, the asking for of the bribe occurs. It had culminations, it had continuations, but we had the inception of it there early.

Then what happens? Shortly after that there is the invitation to have spaghetti. I don't know whether he was going to be over to the house or where it was. But anyhow Dr. Gage's explanation of this little slip, which has the address of his home on it, was that he was going to take me out for a spaghetti dinner. But this man, Mr. Tomsone, according to Dr. Gage, had already showed himself to be a wretched crook, a man who was going to gyp the Government, a man that had made overtures that were irregular. Do you believe Dr. Gage's explanation that he would have associated in a social capacity with such a person? It just isn't reasonable, it just doesn't ring true, it is not a clear bell, it is a false note.

Ladies and gentlemen, let's carry on a little more. This dinner at the Mayfair, or luncheon at the Mayfair, Dr. Gage would have you believe that Mr. Tomsone suggested that we go to the Mayfair. Isn't it more logical to believe that [343] the other was true? Is it a coincidence that Mrs. Gage was down at the Mayfair? I merely re-



cite it. It doesn't mean a great deal to the case. But it is just a chain in the continuity of circumstances which prove that Mr. Tomsone was telling the truth.

Mr. Tomsone—why you could hardly hear his voice there. He didn't show the spirit of enmity. He was trying to tell his story. He isn't as well educated as a lot of us, but he satisfied the Veterans Facility for nearly four years. He had to satisfy them. Had he been a man who would have had a vengeful attitude towards Dr. Gage, he would have exhibited the traits of Curry on that witness stand. And he didn't. And in the cross examination of Mr. Tomsone he was so careful with the truth that at times it became tedious, but he tried to stay right in the story that he had heard, and he wasn't shaken one iota. And he is the kind of witness that an able lawyer can shake because he isn't an alert man, a well-educated man, such as Dr. Gage is.

Now Dr. Gage, who has such an interest in this contract, and a man who knew Tomsone to be a crook, is willing on October 10th—and Mr. Duncan testified that he saw Mrs. Gage and Dr. Gage in Tomsone's shop downtown on October 10th, and Dr. Gage said he was only down there the one time with his wife, so you have to accept that testimony—on October 10th, after the incident of October 3 at the Mayfair Restaurant where [344] the specific offer of \$100 was suggested, the meeting was had where they had clinched the point excepting Dr. Gage didn't realize that Mr. Tomsone had notified the proper authorities of his dereliction.

But we will go back to October 10th. Is it reasonable for a man to take his wife down to a place to have her corrective shoes made, or shoes made, by a man who does



such poor workmanship as Tomsone? Would he be affiliating with this person? Where do we have in this case any place where Dr. Gage went to the proper authorities and complained of his contention of the nefarious character of Tomsone? There was an open-door policy maintained by Mr. Chapman. Mr. Chapman didn't say that he had ever so complained. Dr. Long, his superior, didn't ever so say that he had complained.

Of course he isn't going to complain because he didn't know that Mr. Tomsone had told about him, and he was continuing on and he thought that was a pretty nice chestnut that he was going to pick up. Ladies and gentlemen, it is regrettable to have to prosecute a man who has studied, who has become a medical man, a man of his age. It is also regrettable that a man will sell his honor or information for so little. But corruption in public office cannot be condoned.

Could you believe the testimony coming from Dr. Gage—well, I think it is collateral—but think of the testimony of the irregularity of these shoes, the inferiority of the [345] shoes. Now he has read this contract, he says he has, and you are going to get it if you wish—all of the evidence will be accorded to you—but not a single pair of shoes or a device that Mr. Tomsone makes can be paid for or accepted unless a doctor accepts them as being good. The other doctor who was in the orthopedic department, the other phase of the hospital, so testified. Dr. Gage so testified. The contract is plain. "The Facility reserves the right to reject all items which are faulty in construction, or in which the materials are of unsatisfactory quality.

"No item will be approved for payment until it has been inspected by an authorized representative of the Facility. Acceptance will be governed by the quality of materials, character of workmanship and accuracy of fittings. Before final rejection is made, reasonable opportunity will be given contractor to make the required corrections of faults and adjustments."

I dare say, ladies and gentlemen, that Dr. Gage never read that part of the contract. He was only interested, I dare say, in the items pertaining to price. Remember at this luncheon at the Mayfair that the testimony is to this effect: After they had been discussing this proposition and Dr. Gage had said, "We can both make a lot of money," Dr. Gage then asked, "What about \$100?"

Tomson said, "\$100 a month?" [346]

Dr. Gage said, "Hell, no, \$100 a week."

It was then agreed that they would start writing more orders, Dr. Gage would, and the next Friday twelve orders appeared.

When Dr. Gage was arrested he clearly knew that he had run the gamut of his wrongdoings and he made a remark to the FBI agent which shows a consciousness of guilt. He said he expected this. When he called his wife down at the FBI office—now, listen, we all know that we often will talk over with our wife things that we won't talk over with anybody else, times we do talk over things with our wife that we should—but he hadn't talked to Mrs. Gage all that day, and he talked to her over the telephone and he was heard to say to her, "Yes, I took the money."

Why would he say that if he hadn't previously told her of his plans. That shows consciousness of guilt. Intent, ladies and gentlemen, is a crucial thing in every case. It is not an unusual thing in every case, it is the usual thing. Reasonable doubt is not an unusual thing, is it the usual thing. The presumption of innocence is not an unusual thing, it is the required thing. In some jurisdictions, in Europe, the policy was that you were presumed guilty until you proved the contrary. That isn't the American Way. A man is presumed innocent at every stage of the proceedings until the contrary is proven beyond a reasonable doubt. But when the con- [347] trary has been proven beyond all reasonable doubt, none of those great bulwarks of Anglo-Saxon jurisprudence can be used to stop you in performing your duty and in finding a man guilty of the act that he allegedly and deliberately performed.

In conclusion, it is my belief that this evidence has proven beyond a reasonable doubt to the satisfaction and according to all the requirements of the law that on or about October 3rd—that is the date at the Mayfair luncheon in Santa Monica—he did ask for a bribe in the sum of \$100, with the intent to influence his decision, as charged in the indictment; and on or about October 18th he did receive the bribe in the sum of \$100 with the intent to influence his decision.

The Court: Mr. Sullivan.

## Argument in Behalf of the Defendant

Mr. Sullivan: May it please your Honor, Mr. Neukom, ladies and gentlemen of the jury: At the outset, let me say this, that I certainly agree with Mr. Neukom when he told you that it is the duty of the Government to prove to your satisfaction to a moral certainty and beyond a reasonable doubt the guilt of this defendant. I think that you all know and realize by now, perhaps some of you have had past experiences in jury duty here in this court, that it is not the duty of this defendant to establish his innocence.

Let's examine the evidence in this case and see whether [348] or not it convinces you, ladies and gentlemen of this jury, to a moral certainty and beyond a reasonable doubt that Dr. Gage is guilty of the charges contained in this indictment.

After all, it isn't of any particular importance what interpretation might be put on this evidence by counsel for the Government. By the same token, it isn't of any particular importance what interpretation I might put on this evidence. But it is important, and extremely important, both to the Government and to Dr. Gage, what interpretation you ladies and gentlemen of this jury put upon the evidence in this case. All we attorneys can do is to analyze it as we see the evidence, to assist you in some small measure in arriving at a true and correct verdict.

Mr. Neukom cautioned you about resorting to sympathy in arriving at your verdict in this case. Well, I say to you ladies and gentlemen that we of the defense do not want you to decide this case upon sympathy. We want you to decide this case solely and exclusively upon the evidence

as it came to you from the witnesses in this courtroom. And we say to you that if you do decide this evidence—and we know that you will decide it—solely and exclusively from the evidence as it came to you in this courtroom, that you can reach no other verdict except that Dr. Gage is not guilty of the offenses charged in this indictment. So I come now to an analysis of the evidence in this case. [349]

There are certain things in so far as this evidence is concerned that are absolutely undisputed. The gist of the offenses charged in this indictment I think has already been pointed out to you, that Dr. Gage in the first count asked for a bribe to influence his official action or conduct as an orthopedic physician and surgeon at the Veterans Administration; the second count charges him with having received a bribe with intent to influence his official action or conduct in matters that might be brought before him in his official capacity as an orthopedic physician and surgeon at the Veterans Administration.

Now there isn't any question but what Dr. Gage was employed by the Veterans Administration as an orthopedic physician and surgeon. There is no question but that matters which came before him, in so far as his duties as an orthopedic physician and surgeon were concerned, had to do in part with prescribing orthopedic or corrective footwear for the veterans. Therefore in so far as his duties there were concerned, you have no question. I think that is admitted by the defendant, that in so far as his duties in ordering shoes under this contract was concerned, he was acting in an official capacity.

In so far as his transactions with Mr. Tomsone were concerned, wherein Tomsone handed him \$100, you then



come to decide the question: What was the purpose or intent that ex- [350] isted in his mind at the time that money was given to him, and therein we come to an issue, an issue which you ladies and gentlemen of the jury will be called upon to decide.

Mr. Neukom told you that it was often the policy of the defense to try every issue except the one involved in the indictment. Well, that is the only issue that we have attempted to try in this case, and after all, the evidence which the Court has permitted to go to the jury for their consideration, certainly is material in every respect to a determination of that issue. The contract itself has been admitted in evidence for your consideration, and so the determination of this contract, which you may consider, are material in determining the issues involved.

Let's examine the evidence, in so far as the relationship between Dr. Gage and Mr. Tomsone is concerned. That Dr. Gage was employed at some time in the early part of August goes without saying. At the time he accepted the position as an orthopedic physician and surgeon, the contract with Mr. Tomsone was already in existence, that contract having come into existence on the first day of July 1946.

Dr. Gage had been working there for a month, or maybe a little over a month, before he ever had any occasion to meet Mr. Tomsone. According to Mr. Tomsone's testimony, he did not meet Dr. Gage until the Tuesday after Labor Day.

What is the first thing that takes place between these [351] gentlemen? Almost at the inception of their meeting, according to the evidence in this case, Dr. Gage com-



plains to him about the manner in which he is performing his duties under this contract. What happens? A quarrel ensues between these men. Immediately animosity is aroused. Now if these complaints have come in, and if, as the Government says, Mr. Tomsone can't collect his money until these things have been approved, until all the terms and conditions of the contract have been fully performed, remember this, that every time there is a complaint that comes in, every time that Mr. Tomsone has to do the work over, every time he has to correct some defect of something that he failed to do, it costs him more money. His profits naturally are less. And I think that you ladies and gentlemen of the jury are satisfied that many complaints have come in there, that the veterans themselves have complained about the manner in which he made their shoes. But remember this, that there exists in the mind of Mr. Tomsone at the time of his first meeting, he believes, and he so testified on the witness stand, that the orders he had been receiving for orthopedic shoes had dropped down since Dr. Gage came there early in August until he first met Dr. Gage. He testified further that between the time of his first meeting with Dr. Gage and the time of his—he met Dr. Gage on October 3rd—that his orders further declined.

Now whether they did or did not, it seems to me, is not [352] really material, but Mr. Tomsone himself believed that those orders had declined during that period of time. Actually I think that when you examine Government's Exhibits 4 and 5 I believe that you will see that Mr. Tomsone is in error when he tells you that his orders had declined. For instance, on Government's Exhibit 4, which had to do with the number of shoes ordered by the

outpatient department or for the outpatients, you will find that in the month of August there were nine pair of shoes, orthopedic shoes, ordered, in the month of September, when Mr. Tomsone said they further declined between his first meeting around about the 3rd or 4th of September until the 3rd of October, that they declined further, you will see there were orders placed for 18 shoes. In other words, the orders had doubled that month. Now that is the Government's own exhibit here. That had to do with the outpatients.

In the home department there were orders in August for five pair of shoes and in September there were orders for one. So you have a total of 14 pairs of shoes ordered in August and you have a total of 19 pairs of shoes ordered in September.

Now compare those with the July figures. In July there were 20 pairs of shoes ordered. These things are bound to vary a few pair of shoes depending upon the number of patients that come in for examination or the needs of the patients, but when you examine these exhibits, Government's Exhibit 4 [353] and 5, I think you will see that the variance is very slight. It is only a variance that might be normally expected.

However, I think that the evidence does show this, and I think it shows it without contradiction, that Dr. Gage in his capacity as the orthopedic physician and surgeon there, and because of the complaints that he had found with Mr. Tomsone's work, had come to realize that it was not for the best interests of the veterans whom he was there to serve that the veteran should be compelled to go to Mr. Tomsone to get his shoes. After all, he was doing a job there for the veteran. He was trying to satisfy the

man who had seen service for his country and as a result of which he had suffered some disability. He had to sit there day after day interviewing some 30 or 40 patients, listening to their various complaints, listening to their complaints that Mr. Tomsone couldn't build their shoes satisfactorily for them, and what was he trying to do? He was trying to prevail or find some manner or means whereby the veteran would not be bound because of a contract existing between the Veterans Administration and Mr. Tomsone to have to go to Tomsone to build him shoes. He wanted that veteran to be able to procure a pair of shoes that would be satisfactory to him.

What did he do? And this is admitted by Mr. Howe, one of the Government's witnesses. Dr. Gage went to Mr. Howe. He complained to Mr. Howe about these contracts. He said, [354] "This isn't a proper orthopedic contract." Mr. Howe, the Government's witness, admitted that on the witness stand.

What did Mr. Howe say to him? Mr. Howe told him, "Well, you are an orthopedic man. You redraft that contract the way it should be drawn in order to furnish these men with orthopedic shoes."

That contract had a 30-day cancellation clause in it, and that matter was brought to the attention of Mr. Tomsone, and I think Mr. Tomsone knew and realized at that time there was a possibility that this contract would be redrafted and drawn in the manner in which a proper orthopedic contract should be drawn, and there was a possibility that he would suffer a cancellation of this contract.

Not only that, but if you take the testimony of Dr. Long, another Government witness, Dr. Long says, well,

he didn't complain about the shoes or the way he did it, but he did say we ought to have more than one contract so the veteran has a choice. After all, that is not an unreasonable request to make on behalf of these veterans. You yourself know that if you go to one shoestore and you buy a pair of shoes and they aren't satisfactory, you don't go back and you go some place else. What he was trying to do for these veterans was to give them a choice so that they would be satisfied. And that matter was conveyed to Mr. Tomsone. He knew about it. He knew that there was a possibility that his contract might be [355] canceled.

Now that certainly didn't generate in his mind any friendly feeling toward Dr. Gage. So what does he do? He sets about and puts in motion this operation, a scheme or plan whereby he is going to see that Dr. Gage is discredited in the eyes of the Administration, and being so discredited he will get rid of him. It might be that Tomsone may have realized that Dr. Gage was the first man that really knew his business there so far as orthopedic work was concerned. He probably realized and knew that when he had some man there handling the job who knew his business that he couldn't satisfy him because of the type of work he was turning out.

There isn't any question, ladies and gentlemen, as I said before, that there were lots of complaints by these veterans. You heard some of them on the witness stand here. You heard Mr. Curry, whom Mr. Neukom so thoroughly castigated here. He told you that Curry had on a pair of Tomsone's shoes when he was on the witness stand here, and if there was anything wrong with them it would have been found out. And why is he wearing a pair of Tomsone's shoes when he comes into court?

Why are all of the other veterans who have to wear orthopedic shoes wearing Tomsons's shoes? They are wearing them because they have to wear them, because they can't procure them any place else. That is why they are wearing them. Tomsons had the exclusive contract and, as I told you a moment ago, that [356] was one of the gripes, if you want to call it a gripe, of Dr. Gage's. They couldn't get their shoes anywhere else and, like Curry and like the other veteran we had here on the witness stand who was wearing Tomsons's shoes, they were wearing his shoes because they had to wear them. They couldn't get them any place else.

It is true that Mr. Curry admitted that he was prejudiced against Mr. Tomsons. Naturally he was biased. He said he hadn't been satisfied, but in addition to that he had some knowledge of Tomsons's reputation for honesty and integrity and for telling the truth. He talked to people about it. He knew and had heard of instances where he would make appointments with these veterans and never show up. They had gone there time and again and he wouldn't be there. From what he learned of his dealings he told you that he wouldn't believe him under oath. He is a man that had had dealings with him. His dealings were with him because he was compelled to deal with him, he had no choice in the matter, and likewise with respect to the other veterans who testified here.

That is evidence touching upon the credibility of Mr. Tomsons as a witness, and if you believe that evidence, ladies and gentlemen, if you believe that evidence produced by those two veterans here in this courtroom under oath you are at liberty to disregard and discredit all of the testimony of Mr. Tomsons. [357]



Tomsone then tells you that Dr. Gage gave him his name and address, according to Tomsone, to come down there and discuss this proposition which he claimed that Dr. Gage had made to him. Well if, as I believe, Mr. Tomsone had set in motion some scheme or plan that was going to ultimately result in the discharge of Dr. Gage, he was going to carry that thing through to its logical conclusion. He was doing it principally upon his own. And so he had to have something in the handwriting of Dr. Gage that would strengthen his contention. And so it may well have been that he came to Dr. Gage, as Dr. Gage suggested on the witness stand here, and invited to take Dr. Gage and his wife to dinner and asked him where he lived, write your name and address on that slip of paper, so he kept that. But he never went down there. He didn't go to Dr. Gage's home. What does he do? And this I think is significant in view of the inference that the Government attempted to create in your minds by their cross examination of Dr. Gage.

It seemed to me that they were endeavoring to create the inference that there had been a plan or prearrangement between Dr. Gage and his wife that she was to be at the Mayfair on the day that Mr. Tomsone took Dr. Gage down there for lunch. Well, I think if you examine the evidence carefully you will see that it would have been impossible for any such prearrangement to have occurred, for this reason: Mr. Tomsone [358] didn't call Dr. Gage on Wednesday to take him to lunch until nearly noon. He knew the time that Dr. Gage went to lunch, and according to his testimony there was no understanding between himself and Dr. Gage that he was going to phone him that day. In other words, he hadn't told Dr. Gage,



"I will phone you tomorrow and we will go to lunch," or told him a few days before, "I will phone you on Wednesday and we will go to lunch"; he waited until Wednesday and then out of a clear blue sky he phoned Dr. Gage and invited him to lunch. He says that he phoned Dr. Gage and told him he couldn't come to his house, but how about meeting him for lunch. Dr. Gage said he phoned him and invited him to go to lunch, and he met him out at the Facility.

Now I think that Mr. Neukom was a little bit mistaken in his recollection of the evidence, because if I remember his argument correctly he seemed to imply that Dr. Gage testified here that Tomsone was the one that suggested the Mayfair as a place to go to lunch. Now Dr. Gage didn't so testify, as I remember his testimony. I think he said that Mr. Tomsone, after he met him, started to drive towards Westwood and that Dr. Gage said, "Well, there isn't any good place here, let's go to the Mayfair." So Dr. Gage himself is the one who suggested the Mayfair as a place to go to lunch. So they went to lunch there.

Now Tomsone met him just a very few minutes after call- [359] ing him. Dr. Gage suggested they go to the Mayfair. They went there. The fact that they might have met his wife there as they were leaving is certainly a coincidence. There isn't anything about that that shows a preconceived plan, nothing whatsoever. After all, Dr. Gage told you that he lived in Santa Monica. I assume that he and his wife might have eaten at the Mayfair before. So there is nothing sinister about the fact that Mrs. Gage happened to be there that day, or happened to walk in with some friends of hers as they were leaving.

What transpired there? Again there is a conflict in the evidence. Dr. Gage says that Mr. Tomsone said to him, "Well, you can use some money."

"What do you mean? I don't want any money."

After all, remember this, Dr. Gage had been a practicing physician for almost 19 years, or close onto 20 years. He had served for four years in the Army. He was discharged some place here in California and, like lots of the boys who were in the service, they got out here to California and they liked our country, they liked our climate, they liked our state, they liked our city, and they want to stay here.

What was his ambition? His ambition was to come out here to California to take the State Medical Board examination that would be required of a doctor from another state and practice his profession here in California. That was his [360] one aim, his one ambition. He had taken the examination once and he had failed to pass it. That probably is not unusual in view of the fact that we heard from the witness stand his testimony here that almost his entire professional life had been devoted to specializing in orthopedic surgery, and I assume that with many of those board examinations when you are examined about any of your qualifications they don't confine the examination to the things that a person has particularly specialized in, but their examinations are of a general nature. You know once a doctor specializes in a particular field of medicine or surgery he becomes a bit rusty in the general practice of medicine. But he didn't stop when he took the examination the first time, he took it again and unfortunately he failed to pass it the second time.

In the meantime and with the intent, as he told you, to take the examination the third time he accepted this position out there, not as a permanent proposition as far as he was concerned, he took it temporarily until he was able to take the examination again and determine if he could be licensed to practice his profession here in California.

Now do you think that this man, who had spent 19 or 20 years of his life serving humanity, who had spent practically four years of his life serving his country, that he would come out here to prepare himself to practice his chosen profession in the state of California, take a temporary position [361] at the Veterans Administration, and corrupt his whole life, this man who, according to the character witnesses that we produced here, Dr. Townsend, Mr. Ambling, Mrs. Leflin, Mr. Kramer, those people who had known him, some not too long, some for many years, who knew of his reputation as a law-abiding citizen all his life, knew that it was good, was he going to come out here and corrupt himself for a small pittance, \$100? Certainly not. He had his professional career at stake.

But more than that, after he took this job at the Veterans Administration—he was a doctor, he had been serving humanity all through his professional career—he came in there and he saw the kind of a deal that these veterans were getting. Maybe he was going to be a reformer and reform the whole procedure out there, but one man can't do it. It just is impossible. He might have had high ideals, he might have started out with the thought in mind that he could remedy these defects in the procedure, that he could make things better for the veteran if he

could make himself heard around there, but you just can't do it. You can't buck up against an administration like that and change these long-established procedures, even though you are trying to do it in the interests of the veteran.

Well, that takes us down then to the 3rd of October. If I remember correctly, the next incident of importance, [362] according to Mr. Tomson, was the occasion when he came into Dr. Gage's office and threw a check book down on the desk and said, "Write yourself out a check." He said that Dr. Gage said to him, "I don't want a check, it has to be cash."

Well, Dr. Gage said something to him about making himself out a check and he said, "Go away. Don't bother me."

Tomson, in his endeavor to get rid of Dr. Gage, procured this address before that, but he wanted something else in writing, so he throws a check in front of him. Certainly Dr. Gage told him, "Go on away. I don't want your check." So he didn't take it.

Then on the 18th he met him there sometime after 2:00 o'clock and he said that Dr. Gage asked him to come on down to the canteen and have a cup of coffee. They went down to the canteen, from there on out to the auto park where, according to Tomson, he handed the money to Dr. Gage. There is no question but what he handed the money to Dr. Gage. There is no question but that Dr. Gage took the money and put it in his trousers pocket. There is no evidence of any bribe in any way. Mr. Tomson didn't say that Mr. Gage took the money and counted it, clipped it together and put it in his pocket. He said he handed the money to Dr. Gage and Dr. Gage slipped

it in his pocket, in his left trousers pocket. There is no evidence that at that time anything was said to Gage as to how much money there was, what the denomination of [363] these bills was or anything else.

But remember this, that Dr. Gage, according to his testimony, had prior to that time complained to Dr. Long that Tomsone was trying to proposition him, and Dr. Long had no recollection, either he had no recollection of any such testimony or denied it, I forget which, but you will have to rely upon your own recollection of that, but in any event you have to remember this, that Dr. Long was the chief medical officer of the outpatient department and the outpatient department consisted not only of the orthopedic department but of every other department where the outpatients have medicine and surgery that were treating outpatients down there, and unquestionably Dr. Long was a very, very busy man and unquestionably there would be many things that would come to his attention that his recollection might be somewhat faulty on. I believe, and I honestly believe, that Dr. Gage did go to him and did tell him that Tomsone had been trying to proposition him.

In any event, Dr. Gage told you that when he took this money it was his invention to go to Dr. Long with it. Now there was considerable inference and emphasis put upon the fact that after he came back into the building he went into his office instead of going directly to Dr. Long's office. Well, remember this, that when he came back there Tomsone came with him, Tomsone followed him back there and, after all, [364] he didn't have to take that and go immediately into Dr. Long's office with it, or he didn't have to take it and go immediately over on Sepulveda Boulevard to Mr. Chapin with it. He didn't have



to rush over there right away with it and say, "Aha, at last I've got him. Here it is. I just took it. He just gave it to me." I mean, there was time to do those things. After all, as the Government contends here, the Government contends that on the 3rd of October Dr. Gage asked Tomsone for a bribe, and they have formed that particular matter as Count 1 of this indictment, and they claim that on the 3rd of October Dr. Gage committed the offense of asking for a bribe. Well, they didn't arrest him then, did they? If, as they contend here, a crime had been completed at that time, if, as the Government contends, Dr. Gage then asked of Tomsone a bribe, that is a complete offense, and that is the matter contained in Count 1 of this indictment. But they didn't arrest him.

Instead they say no, "When he took this money and said he was going to Dr. Long or to Mr. Chapman he should have gone immediately there." Well, if that be true, if, as they contend, he committed that offense on the 3rd of October, why in the name of common sense didn't they arrest him at that time? I will tell you why they didn't arrest him. Because they knew that no such crime had been committed at that time. Maybe Tomsone had said something to somebody, but they had [365] their doubts about Tomsone too.

Now there is another significant thing about the evidence in this case, ladies and gentlemen, which you can take into consideration in determining the intent that was in the mind of Dr. Gage. We had Dr. Levine up here, we had Dr. Kane, we had Mr. Chapman, Mr. Nie, we had Dr. Long, we had Dr. Musset, we had Dr. Strachan—all of these men who were connected with the Administration out there, all of them who said to some greater or



less degree that Dr. Gage was complaining about Tomsone. His principal complaint seemed to be that Tomsone's work was not as it should be. He complained to his associates at the Administration there about Tomsone. Now do you think that it would be logical for a man to go around and spread all these complaints about a man who was furnishing shoes to the Administration there, make it known wide and far out at the outpatient department there or the Administration that this man doesn't know his business, he *disn't* building things according to the contract, and then turn around and with no further ado immediately begin to send him large orders for shoes? I mean that just isn't logical, to assume that he would do that.

If he were laying a plan to accept a bribe from Mr. Tomsone he certainly would have endeavored to build Tomsone up in the minds of his associates there so that when Tomsone did begin to receive more orders there would have been a logical [366] reason for it. In other words, he would have been satisfied and he would have let everybody else know that Tomsone was a great guy, that he was doing a good job there, that he was going to send him a few more orders. These little doubtful cases we can weigh them in favor of the veteran because he is doing a good job.

But that wasn't the way he operated. Just to the contrary. He denounced him, denounced him time and again. Is that the foundation for a scheme or plan on his part to accept a bribe from Mr. Tomsone in order to send him more orders for shoes? Certainly not, ladies and gentlemen, and I don't believe that you believe that under those circumstances he would have done such a thing.

So that again is something that you may take into consideration in determining what was in the mind and heart of Dr. Gage. He told you here specifically that he never at any time had any intention in his mind and heart to ask a bribe of Tomson for the purpose of influencing his action or decision on any matter that came before him out there as an orthopedic physician and surgeon. He told you again specifically that he never at any time had any intention in his mind and heart to accept from Mr. Tomson a bribe for the purpose of influencing his action and decision on any matter that might come before him in his official capacity as an orthopedic physician and surgeon. I believe that his Honor in his in- [367] structions that he will give to the jury will tell you that if the evidence in this case is susceptible of two reasonable constructions or interpretations, one of which would admit of the guilt of Dr. Gage and one which would admit of his innocence, that it is your duty, your sworn duty as jurors, to adopt that construction which will admit of his innocence and reject that which points to his guilt.

Remember this further, ladies and gentlemen, the fact that he did take the \$100, that would raise suspicion in your mind. I realize that, that it raises a suspicion. But again suspicion is not evidence. No matter how grave the suspicion is, it is never evidence sufficient upon which to base a verdict of guilty.

And so I believe, ladies and gentlemen, that when you have weighed and considered all of the evidence in this case in the light of the instructions as they will be given to you by his Honor that you can reach no other conclusion than that Dr. Gage is not guilty of the offenses charged in this indictment.

Thank you.

The Court: Mr. Neukom, how long will you want to close?

Mr. Neukom: I think about 10 minutes.

The Court: Very well.

Closing Argument in Behalf of the Government.

Mr. Neukom: Dr. Gage is a great benefactor. He is a [368] man that was so interested in these poor veterans that after he had only been there a short while he immediately takes four days off to take care of other matters. The day he was caught with the bribe he had been two and a half hours away for lunch. He admits it. The day he went with Mr. Tomsone to Santa Monica, despite the fact that there is a canteen right on the place, they go down to Santa Monica, drive all that distance. Why, ladies and gentlemen, the only desire upon the part of this man to be a benefactor of these poor veterans has been conceived since his arrest.

Counsel would inquire as to why he was not arrested on October 3rd. Obviously the case at that point was one man's word against another. The asking is a much different thing from receipt. I don't know how you try to interpret this evidence, but anybody who took from a person that they had the disregard for that he said he had, this man that had been offering him irregular things, placed his check book out on the table to allow him to write a check for his benefit, why ladies and gentlemen, the first thing you would have done, and especially with Mr. Tomsone tagging along behind, was to get Tomsone by the scruff of the neck and drag him in to somebody and say, "Look what he has done. He has tried to bribe me."

But he didn't do that. He didn't expect to be caught.

Dr. Gage has violated the Eleventh Commandment: Thou shalt not be found out. Character witnesses are of no avail [369] if you have committed a crime. There is always the first time. Many a man goes through life and even advances without committing a crime, and he has had a good character in the past, but character is of no avail if you are caught flat-footed and red-handed.

The Bible carries a characteristic or a most noteworthy example of where a man sold his birthright for a pot of porridge. People have been tempted to and have done things which seem inexplicable when they do them, when they are public officials, but corruption in public office should not be condoned.

I contend, with the evidence here, it establishes beyond any question of doubt the truth of the statements made by Mr. Tomsone. They are corroborated by other people to whom Mr. Tomsone had complained. Had Dr. Gage produced one single person here in court to whom he had said that Mr. Tomsone is endeavoring to offer me a bribe and had made such an entreaty to me a month ago, or something like that, there would be something to his story. The only thing that Dr. Gage was interested in was to make complaints about this contract that he himself was interested in. You will remember the testimony that he wanted Mr. Tomsone to step aside, that it would be canceled and that he would get the contract under another name. Naturally he didn't care whether he criticized Tomsone or not. But he never criticized Tomsone's work to his super- [370] ior, he never criticized it to the manager Mr. Chapman, nor to Dr. Long, and I think you will remember their testimony. And they had no reason to do anything else but tell the truth.

You will remember the FBI was working on this case and on the 15th of October the agent heard these remarks: Tomsone said—this was Dr. Gage and Tomsone in Dr. Gage's office—Tomsone said, "I meant to bring the money out today but I couldn't."

The doctor replied, "Oh, that's all right. Don't worry about it."

You remember the words. I have just my notes here.

At this point there was some low conversation which couldn't be heard, and he heard the doctor's voice say. "Next Friday I have got to be downtown."

Tomsone then replied, "Friday?"

And the doctor answered, "Yes. You understand what I mean by that, don't you?" or words to that effect.

That showed a plan, that showed the guilty intent, that showed just exactly what was in his mind.

I do say, ladies and gentlemen, that there has been an effort to try the contract here rather than to try the issues, but that is for you to decide. It isn't unusual for only one contract to be in existence. Government officers are compelled to accept the lowest bid if it is otherwise a qualified bid. Tomsone had apparently been giving satisfaction for [371] nearly three and a half years out at that Facility. There is nothing in the evidence here to indicate that this was not a regular Government contract. There has been no effort upon the part of this man, other than his complaints that I think are more now in his mind than they were at any other time, to just try to discredit this contract.

It is very true that veterans, and especially veterans who are suffering from disabilities and have a lot of time



on their hands, will gripe and complain a lot. Why even we healthy people gripe and complain a great deal about petty things. And it is also true that certain veterans would have been dissatisfied. Do you know of anybody that can satisfy everybody? It would be a wonderful character to know.

This man was experienced in his orthopedic work, he had been in it for years, the evidence showed that he had tried to make adjustments whenever he could, he even testified that it was his policy to go out and fit the veterans at their places, their homes. There was nothing to show that Mr. Tomsone wasn't trying to cooperate. The thing that Mr. Tomsone did, and did right, was to immediately notify the proper officials at the Facilities and cause a proper investigation to be conducted, which I think was proper here because of the conclusion that was reached, which culminated in this man doing just what he intended to do and then being caught red-handed. But I do not think that should be used as critical [372] against Mr. Tomsone. I don't think Mr. Tomsone was very worried that Dr. Gage was going to make him lose his contract. I think Mr. Tomsone was worried that he might get involved with this Dr. Gage and therefore he promptly reported it, as is evidenced from what Dr. Long said, what Mr. Duncan said and I believe other testimony that has been offered here.

I didn't mean to draw any improper allusions or conclusions as to the happenstance that Mrs. Gage was at the Mayfair, and I don't think there was anything, as counsel says, sinister in that. The only thing sinister in that is where the offer specifically was made of \$100 a week. Remember that Mr. Tomsone in this contract—



and you can see it—not only had this outpatient department, this one particular Facility, but he had a contract which covered a great many other institutions. Don't try to impeach him upon the grounds that he said he couldn't remember whether it was more or less than one month, because the little man said, "I don't know for sure, but I will get my books if you want them." Nobody tried to get him to get his books. I don't think it mattered. The whole thing that did matter was that there were more shoes being offered, being ordered, after they had met at the Mayfair Restaurant.

Now, ladies and gentlemen, you must decide this case from the evidence that has been offered. The Government is entitled to your verdict if you believe it has proved its [373] case beyond a reasonable doubt. The defendant is likewise entitled to such a verdict if the Government has failed. But you must use all proper and logical deductions from the evidence, and in reasoning and in discussing this matter with each other you must be fair with one another but you must reach a right and correct verdict.

There may be read to you an instruction upon the theory of entrapment. Counsel has not argued that, hence it is with some reluctance that I allude to it. If a person is entrapped to commit a crime which he wouldn't otherwise do, the Government has no right in prosecuting him. But if a person is merely caught by Government agents who gave him an opportunity to commit a crime which was in his mind, the mere fact that he is caught and was afforded the opportunity to do what he had previously planned is no defense, nor is it entrapment.

I wish to thank you for your very patient and kind attentiveness in connection with this case.

The Court: Ladies and gentlemen, this is the time that I should instruct you but you have been here since 9:30. I have another case which has been set for this morning and I think that I will declare a short recess in this matter and impanel the jury in the other matter and let them go until 2:00 o'clock so as to save the inconvenience of those who would not be chosen. So you will retire to the jury room until called. Remember the admonition. [374]

(Short recess.)

The Court: The record will show that the defendant is present in person and by counsel and that each of the jurors is present and in his or her place in the box.

Mr. Neukom: So stipulated.

Mr. Sullivan: So stipulated. [375]

#### Instructions to the Jury.

The Court: Ladies and gentlemen of the jury, it now becomes my duty as a judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow that law as I shall give it to you. On the other hand, it is your exclusive province to determine the facts in the case and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be *must be* exercised with sincere judgment, sound discretion, and in accordance with the rules of law as I shall state them to you.

If in these instructions any direction or idea be stated in varying ways, or if a subject matter is treated first or last, no emphasis is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the

instructions as a whole and to regard each one in the light of all the others. Nor are you to regard any repetition or partial repetition of an instruction as a special emphasis on that instruction.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact directly in dispute, without an inference or a presumption, and which in itself, if true, conclusively establishes the fact in issue. Indirect [376] evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or a presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive—and there are no conclusive presumptions in this case—a presumption may be controverted by other evidence, direct or indirect, or by another presumption, but unless so controverted the jury is bound to find according to the presumption.

An inference, on the other hand, is a deduction which the reason of the jury draws from other facts which are proved. It must be founded on a fact or facts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, or by the course of business or the course of nature. The word “propensity” as I have used it means any natural or habitual inclination or tendency.

You are not bound to decide in conformity with the testimony of any number of witnesses which does not

produce conviction in your mind as against the declarations of a lesser number of witnesses or as against a presumption or other evidence [377] which appeals to your minds with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does not mean that you are to decide an issue by the simple process of counting the number of witnesses who have testified. It does mean that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

The testimony of one witness, entitled to full credit, is sufficient proof for any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if, from the whole case, considering the credibility of the witnesses and after weighing the various factors of evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

In weighing the testimony of witnesses it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring, or an inclin- [378] ation to favor, any party. Was he, in other words, a biased or impartial witness? What degree of intelligence, what

quality of memory, what grade of moral purpose, so far as concerned this case, were revealed by his appearance, manner of testifying, and all other evidence in the case? Was the testimony reasonable and consistent within itself and with uncontradicted facts? Was there any timidity, physical handicap, lack of ability in self-expression or other condition that placed the witness at a disadvantage or caused his testimony to appear on the surface as being less trustworthy than it really was? Was the witness without fault of his own confused or embarrassed and thus placed in a ilght not truly representative?

Should you consider any of these questions, either in your own private reasoning or in open discussion, you must look for an answer only to the evidence admitted in the trial of this action.

Any evidence that has been received on an act, omission or declaration of a party which is unfavorable to his own interests should be considered and weighed by you like any other admitted evidence, but evidence of the oral admission of a party, rather than his own testimony in this trial, ought to be viewed by you with caution.

From time to time counsel for one or the other parties has interposed objections to evidence. Counsel not only have [379] the right, but the duty to make any and all objections which are deemed advisable or appropriate, and no inference or presumption can or should be indulged in one way or the other by reason of the interposition of such objections.

At times throughout the trial the Court has been called upon to pass on the question of whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and



are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law, and in admitting evidence to which an objection might have been made the judge does not determine what weight should be given such evidence, nor does he pass on the credibility of any witness. As to any offer of evidence that was rejected by the judge, you of course must not consider the same, and as to any question to which an objection was sustained you must not conjecture as to what the answer might have been or as to the reason for the objection.

The law does not require the accused to prove his innocence, which in many cases might be impossible, but on the contrary the law requires the prosecution to establish beyond a reasonable doubt and by legal evidence his guilt, and all the elements of his guilt. If the Government fails to so prove beyond a reasonable doubt all the elements, as I shall define them to you, you must find the accused not guilty. [380]

You must not allow yourselves to be led to convict the accused in this case in order to satisfy a fear that some offense may go unavenged or unpunished, or for the purpose of deterring others from the commission of any like offenses. No such specious argument or reason can be weighty enough to justify you in laying aside that just and humane rule of law which requires you to acquit the accused unless every fact necessary to establish his guilt is proved to you beyond a reasonable doubt and to a moral certainty.

The rule concerning circumstantial evidence does not permit you as jurors to indulge in speculation, surmise, conjecture or guesswork in order to supply any element of



the offense alleged by the prosecuting witnesses in this case to have taken place, where proof of such element does not appear beyond a reasonable doubt and to a moral certainty. Speculation, surmise, conjecture or guesswork can never be substituted in lieu of proof in order to justify a conviction of an accused person.

Suspicion is not evidence. Mere suspicion, however strong, is not sufficient to establish any fact whatsoever necessary to constitute the crime charged. Mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of evidence support the allegations of the indictment, nor is it sufficient that upon the doctrine of chance it is more probable [381] that the accused is guilty than innocent to warrant a conviction. The accused must be proved to be guilty so clearly that there is no reasonable theory upon which he can be said to be innocent when all the evidence is considered together. Mere opportunity of the accused to commit the crime charged is insufficient to justify a verdict of guilty.

Each essential independent fact necessary to complete a chain or series of independent facts tending to establish a presumption of guilt should be established to the same degree of certainty as the main fact which these independent circumstances taken together tend to establish, that is, each essential independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty and beyond a reasonable doubt and to the entire satisfaction of the jury. The circumstances must all concur to show that the defendant committed the crimes and must all be inconsistent with any other rational conclusion and must exclude to a moral

certainty and to the entire satisfaction of the jury any other hypothesis but the single one of guilt.

Duly qualified experts may give their opinions on questions in controversy at this trial. To assist you in deciding such questions, you may consider the opinion with the reasons stated therefor, if any, by the expert who gives his opinion. You are not bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such [382] opinion, if you find it to be unreasonable.

In every criminal case the proof must substantially conform to the material allegations of the indictment.

By the arrest of the defendant and the filing of the indictment, no presumption whatsoever arises to indicate that the defendant is guilty or that he had any connection or responsibility for the act charged against him. A defendant is presumed to be innocent at all stages of the proceedings, and that presumption goes to the jury room, until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. This rule as I have stated applies to every material element of the offense.

A reasonable doubt I will define to you in the legal definition, but I will give you a short definition which is mine. A reasonable doubt is a doubt that you can assign a good reason for having. The legal definition is that a reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it

must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs. Reasonable doubt is not a mere possible or imaginary doubt, or a bare conjecture, for it is difficult to prove a thing to an absolute certainty. [383]

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt, as the same has been defined to you. Without it being restated or repeated again, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all of the instructions that are given to you.

In judging the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you might reach a contrary conclusion. Whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial and to the evidence which has been introduced. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evi- [384] dence affecting his character for truth, honesty and integrity, or by his motives, or by contradictory evidence.

In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole or any part of the evidence or testimony of any witness, as may be dictated to you by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all the circumstances under which the witnesses testified, as I have heretofore delineated them to you, and in addition to that the relation that he might bear to the Government or to the defendant, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other witnesses, or other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jurors should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

You are not limited in your consideration of the evidence to the bald expressions of the witnesses, but you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women. [385]

The interest of a defendant in the result of the action does not deprive him of the benefit of his own testimony. The law makes him a competent witness in his own behalf, and his testimony is entitled to full and fair consideration by you, the same as that of any other witness, and is sufficient in itself, if it raises in your minds a reasonable doubt as to whether the crime charged was committed by such defendant to entitle him to an acquittal.

You cannot base a verdict of guilt upon extra-judicial oral admissions, or statements of a defendant alone, unless there is other evidence independent of such extra-judicial oral admissions or statements which establishes the body of the crime with which defendant is charged, or what is known as the corpus delicti and if you do not believe after a consideration of all the evidence that the body of the crime or the corpus delicti is established by evidence other than such extra-judicial oral admissions or statements, then and in that event, you cannot consider such extra-judicial admissions or statements for any purpose.

The mere fact that a witness is connected with the Government of the United States in any capacity whatsoever does not mean that the testimony of such a witness is entitled to any greater weight or credence by reason of that fact alone. You will consider the testimony of any officer or employee of the United States Government the same as you would consider [386] the testimony of such person if he were not so employed.

Although counsel did not argue the matter, it was indicated by the testimony that the defendant was considering the defense of entrapment. By raising such defense he does not admit the facts charged but such acts must be proven to your satisfaction beyond a reasonable from the evidence in the case and under these instructions. If, however, you so find that he committed such act as charged then you must consider whether he was entrapped into committing them.



So far as entrapment is concerned, it has been judicially defined as follows:

"The first duty of the officers of the law is to prevent and not to punish crime. It is not their duty to incite and create crime for the sole purpose of prosecuting and punishing. It must not be their endeavor to cause or to create crime in order to punish, and it is unconscionably contrary to the public policy and to the established law of the land to punish a man for the commission of an offense the like of which he would never be guilty, either in thought or deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded and lured him to attempt to commit it. Decoys may be used to entrap criminals and to present opportunity to one intending [387] or willing to commit a crime, but decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates not with the accused but is conceived in the minds of the Government officers and the accused is, by persuasion, deceitful representation or inducement, lured into the commission of a criminal act the Government is estopped from sound public policy in the prosecution thereof."

So that if you should find that there was such entrapment then the defendant is entitled to your verdict of not guilty, even though you may find beyond a reasonable doubt that he did the acts alleged.

Coming now to the specific charges in this case, the indictment in this case has been brought under the Federal Statute known as 18 U.S.C., Section 207. The pertinent portion of it reads as follows:

"Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in



any official capacity, under or by virtue of the authority of any department or office of the Government thereof; \* \* \* shall ask, accept, or receive any money \* \* \* with intent to have his decision or action on any question, matter, cause, or proceeding which may [388] at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be \* \* \* guilty of a crime.

An appropriate punishment is provided, but you are not to be concerned in your reasoning or your conclusion with the punishment which the law provides or permits.

The indictment in this case consists of two counts. It has been read to you and hence I will not re-read it. Both counts have been brought under the same statute which I have just read to you.

The first count charges that on or about October 3, 1946 the defendant asked for a bribe in the sum of \$100 from one Hubert Tomsone, and the second count charges that on or about October 18, 1946 he received \$100 from Hubert Tomsone as a bribe, all contrary to the statute.

The gravamen, or material part, of the offense charged in Counts 1 and 2 of the indictment in this case is, in Count 1, the asking of a bribe, and in Count 2, the accepting or receiving of a bribe by a person acting on behalf of the United States for the purpose and with the intent on the part of the defendant of influencing his official conduct.

You are instructed that to fall within the meaning of the section of the Criminal Code, under which the defendant has been indicted, it is not necessary that he be an officer [389] of the United States, but it is sufficient if he is a person acting for or on behalf of the United States in

any official capacity under the authority of any department or office of the Government. The United States Veterans Administration is and was on all dates material hereto an office, department, or agency of the United States.

In respect to Counts 1 and 2 of this indictment, you are first to ascertain from the evidence and the logical and reasonable inferences that can be drawn therefrom, as to whether or not the defendant, on the dates on which it is alleged the defendant asked and received the bribe, was a person acting for and on behalf of the United States in the official capacity of Orthopedic Physician in the Out-patient Department of the United States Veterans Administration Center, West Los Angeles, California.

Next, you should ascertain from the evidence whether or not his official duties required or permitted the defendant to act in any way in connection with the number or quantity of shoes to be delivered by Tomsone under the contract which has been introduced in evidence.

Each of these elements must be found to exist beyond a reasonable doubt.

Every action that is within the range of official duty comes within the purview of the bribery statute. To constitute official action, it is not necessary that it be pre-[390] scribed by statute. It may be required by some written rule or regulation, or it might also be required by established usage which constituted the law governing the United States Veterans Administration and fixed the duties of those engaged in its activities.

If you find the matters as covered in the preceding instructions, you should next ascertain from all of the evidence offered, and beyond a reasonable doubt, whether

or not the defendant asked for or accepted and received money, to wit, a bribe, with the intent to influence the decisions and actions of the defendant in the exercise or carrying out of his official duties as charged in the indictment.

It is not necessary for you to find that the defendant's design or action was actually influenced by the asking or the receipt of a gratuity, but it is a violation of the statute if the defendant intended to have his official action influenced by the receipt of a gratuity.

You are instructed that the guilt of the defendant depends upon proof that he either asked, or accepted, or received a gratuity as alleged in the indictment and does not depend upon the degree of receptivity of the mind of the person of whom the gratuity was asked or from whom it was accepted or received.

A public officer or a person acting for or on behalf of the United States cannot be acquitted of accepting a bribe [391] because he was legally bound to do that which he agreed to accept a bribe for doing.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question which depends upon evidence presented to them. You are expected to use your good sense, to consider the evidence for the purpose only for which it was admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no doubt remains the Government is entitled to the verdict,

for to the jury, to you, belongs exclusively the duty of determining the facts.

If the judge has said or done anything which has suggested to you that he is inclined to favor the claims or position of either the Government or the defendant in this case, you will not suffer yourself to be influenced by that suggestion. He has not expressed or intended to express, or intimated or intended to intimate, any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established, what inferences should be drawn from the evidence adduced or not, and if any expression of the judge has seemed to indicate to you any opinion relating to [392] any of these matters you are instructed to disregard it.

You should not consider as evidence any statement of counsel made during the trial unless such statement was made as an admission or a stipulation conceding the existence of a fact or facts. You must not consider for any purpose any evidence offered or rejected or which has been stricken. You are to decide this case solely upon the evidence that has been admitted by the Court and the inferences that you may reasonably draw therefrom and such presumptions as the law may deduce therefrom as heretofore directed in these instructions.

It is your duty as jurors to consult one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment in the case. To each of you I would say that you must decide the case for yourself, but should do so only after a consideration of the case with your fellow-jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, none of you

should vote either way, nor be inslued in so voting, for the single reason that a majority of the jurors are in favor of such a vote. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict, or solely because of the opinion of other jurors. [393]

Remember that you are not partisans or advocates in this matter, now you are judges. The final test of the quality of your service will lie in the verdict which you return to this courtroom, not in the opinions which any of you may have when you leave this room. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end the Court would remind you, in conclusion, that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

After the bailiffs have been sworn you will retire to the jury room, you will select one of your number to act as foreman, and when you have agreed upon a verdict the foreman will fill in the blanks in the form which the bailiff will hand to you indicating what your conclusion is. You may find the defendant not guilty as to both counts, guilty as to one count and not guilty as to the other count, or guilty as to both counts. After you have reached the conclusion and filled out the verdict the foreman will sign it and each of you will return to the courtroom.

Counsel have heretofore indicated their objections to the instructions as given in Chambers and they will be deemed to have been made in court in the presence of the



jury. If there are any further objections you may state them at this time. [394]

Mr. Sullivan: No further objections as far as the defendant is concerned, your Honor.

Mr. Neukom: None, your Honor.

The Court: The Clerk will swear the bailiffs.

(At this point two bailiffs were duly sworn by the Clerk.)

The Court: If the jurors decide they wish to see the exhibits the bailiff will call upon the Clerk to furnish them.

The bailiff will take the jury to lunch and then take them to the jury room for deliberation.

(The jury retired from the courtroom at 12:15 o'clock p. m.) [395]

Los Angeles, California; December 13, 1946; 3:35 o'clock P. M.

The Court: The record will show the defendant Gage is present in person and by counsel.

Mr. Bailiff?

The Bailiff: The jury has reached a verdict, your Honor.

The Court: The record will show that each of the jurors has returned to his or her place in the box.

Mr. Foreman, has the jury arrived at a verdict?

The Foreman: We have, your Honor.

The Court: Will you fold the verdict and hand it to the bailiff?



(The verdict was passed to the Court.)

The Court: The Clerk will read the verdict.

The Clerk: "In the District Court of the United States, Southern District of California, Central Division.

"United States of America, Plaintiff, v. Theodore S. Gage, Defendant.

"No. 19055, Criminal. Verdict.

"We, the jury in the above-entitled cause, find the defendant, Theodore S. Gage, guilty as charged in the first count of the indictment, and guilty as charged in the second count of the indictment.

"Dated: Los Angeles, California. December 13, 1946.

"Harry D. Dudding, Foreman of the Jury." [396]

The Court: The Clerk will poll the jury.

The Clerk: Will each juror answer yes or no if this is his or her verdict.

(At this point the Clerk duly polled the jury, each answering "yes.")

The Court: Very well. The jury is excused. Thank you for your time and attendance. You will be excused until notified.

(Whereupon the jury retired from the courtroom at 3:40 o'clock p. m.)

The Court: The defendant will stand committed. The matter of sentence will be continued to and set for December 30 at the hour of 2:00 o'clock p. m.

Mr. Sullivan: Your Honor, I wonder if the Court will consider referring this matter to the Probation Department.

The Court: I will of my own motion refer it to the Probation Department, but the defendant will stand committed, and his bond will be exonerated. The matter will be continued until December 30th for sentence.

Mr. Sullivan: That is at what hour, your Honor?

The Court. 2:00 o'clock p. m. of that day.

[Endorsed]: Filed Mar. 18, 1947. [397]

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[Endorsed]: No. 11532. United States Circuit Court of Appeals for the Ninth Circuit. Theodore S. Gage, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 25, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

Appeal No. 11532

(Civil Action No. 19055. District Court, Southern  
District of California, Central Division.)

THEODORE S. GAGE,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Respondent.

APPELLANT'S STATEMENT OF POINTS ON  
APPEAL

In accordance with Rule 19(6) of the Rules of this Court, appellant, Theodore S. Gage, hereby makes his statement of the points on which he intends to rely on appeal, as follows:

1. The indictment does not, nor does any count therein, state facts sufficient to constitute an offense against the United States.

2. The evidence is insufficient to establish the necessary elements of the offense charged, to-wit:

a. That appellant was acting in the capacity required by the statute under which he was convicted;

b. That appellant had the specific intent required by the statute under which he was convicted;

c. That appellant possessed the decision or action required by the statute under which he was convicted.

3. The evidence is insufficient to sustain the verdict and judgment.

4. The verdict and judgment were contrary to the law and the evidence.

5. The trial court erred in excluding the evidence of Fred Skill.

6. There was no specific finding that appellant was an officer of or acting for or on behalf of the United States in an official capacity, or that appellant possessed the decision or action required by the statute for a conviction thereunder, or that appellant possessed the specific intent required by the statute for a conviction thereunder.

7. Appellant was denied due process of law, as guaranteed by Amendments V and VI of the Constitution of the United States, in that:

a. The presumption contained in the statute, as construed and applied in this case, violated said Amendments;

b. There was no specific finding that appellant was an officer of or was acting for or on behalf of the United States in an official capacity;

c. There was no specific finding that appellant possessed the decision or action required by the statute for a conviction thereunder;

d. There was no specific finding that appellant possessed the specific intent required by the statute for a conviction thereunder;

e. Appellant was prevented from properly presenting his defense due to the mismanagement thereof by his trial counsel.

8. Appellant's trial counsel mismanaged and improperly presented the trial thereof to such extent as to necessitate a new trial.

9. The trial court erred in denying appellant's motion for a new trial, among other things, in the face of voluminous newly-discovered and subsequently elicited evidence by appellant's new attorney, submitted to the trial court at the hearing upon said motion, conclusively establishing that it was common gossip and general knowledge throughout the hospital where appellant was employed, that appellant had made many statements in and about said hospital to the effect that Tomsone, the Government's principal witness, was bribing persons in the hospital administration, and that appellant had made numerous statements to the effect that, and that it was generally known, that appellant was seeking to establish the same and to entrap said Tomsone, and to prevent the purchase of inferior materials sold to said hospital by said Tomsone, and that all of appellant's conduct was designed for said entrapment and for the benefit of the hospital, as aforesaid.

10. The trial court erred in denying appellant's motion in arrest of judgment.

11. The trial court erred in denying appellant's motion for acquittal.

Dated: May 1, 1947.

JOSEPH J. CUMMINS

Attorney for Appellant, Theodore S. Gage

Service acknowledged May 1, 1947. James M. Carter, United States Attorney; Arthur Livingston and Norman W. Neukom, Assistant U. S. Attorneys; by L. Wayne Thomas, Chief Clerk, Attorneys for Respondent.

[Endorsed]: Filed May 2, 1947. Paul P. O'Brien, Clerk.